Petition

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No. .....

Supreme Court of the United States

OCTOBER TERM, 1981

MARY SUE HUBBARD and DUKE SNIDER,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Questions Presented

1. Whether this Court's decision in *Andresen* v. *Maryland*, 427 U.S. 463, authorizes a massive search and seizure of documents where: (a) the search warrant directs the searching agent to seize "any and all fruits" or evidence of conspiracy or other crimes, as set forth in an accompanying thirty-five page affidavit; (b) almost half the searching agents never read the warrant or affidavit and received a concededly inadequate briefing on what to look for in the search; (c) even the more extensively briefed searching agents admitted to searching for and seizing large categories of documents outside the scope of the warrant; and (d) as the court of appeals acknowledged, substantial numbers, perhaps a significant majority, of the documents seized were outside the scope of the warrant?

2. Whether the decision of the court of appeals that the plain view doctrine justified the seizure of massive numbers of documents outside the scope of the warrant (described in question 1) was improper in that it sanctions general searches and seizures in violation of the Fourth Amendment?

3. Whether the court of appeals improperly sanctioned general searches and seizures and eviscerated the exclusionary rule by holding that the seizure of massive numbers of documents outside the scope and/or beyond the geographical limitations of a warrant does not require suppression of the fruits of the search so long as the searching agents acted in good faith?

4. Whether the court of appeals' opinion excusing an overbroad search on the grounds that it did not display "flagrant disregard" of the warrant authorizes general

searches and eviscerates the "fruit of the poisoness tree" doctrine?

5. Whether the decision of the court of appeals excusing the government's violations of a disposition agreement in which it agreed not to allocate against Mrs. Hubbard were improper and will have deleterious consequences for the integrity and viability of the plea bargaining process?

6. Whether evidence that the district judge falsely represented, upon inquiry by defense counsel, that the extraordinary security measures he had ordered had nothing to do with the defendants or their case, coupled with evidence of an extrajudicial statement by the judge in which he engaged in a "hostile monologue" about the defendants and stated that he felt "threatened" by them, entitles the defendants to a hearing on the issue of whether the judge should recuse himself pursuant to 28 U.S.C. § 455?

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Supreme Court of the United States

OCTOBER TERM, 1981

MARY SUE HUBBARD and DUKE SNIDER,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Mary Sue Hubbard and Duke Snider petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit affirming their convictions of 18 U.S.C. § 371.

Opinions Below

The opinion of the court of appeals (App. A, 1a-107a),[1] and the denial of separately filed petitions for rehearing (App. B, 109a-110a) are unreported. The district court's denial of the suppression motion (App. C, 111a-233a) is reported at 493 F.Supp. 209. The district court's orders denying the separate motions of the petitioners charging violations of the disposition agreement (App. D, 235a-249a) are unreported. The district court's memorandum and order denying the recusal motion (App. E, 251a-269a) is unreported.

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[1] References herein to "a" are to pages in the appendix portion of the petition, *infra*.

Jurisdiction

The judgment of the court of appeals (App. G, 379a-380a) was entered on October 2, 1981. The petitions for rehearing were denied on November 10, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Constitutional Provisions and Statutes Involved

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

28 U.S.C. § 455 provides in relevant part:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned . . . .
>
> He shall also disqualify himself in the following circumstances:
>
> Where he has a personal bias or prejudice concerning a party . . . .

Statement

1. *The Search*

On July 8, 1977, more than 100 agents and 30 support personnel of the F.B.I., acting pursuant to identical warrants, entered two premises in Los Angeles, California belonging to the Church of Scientology of California. The

search of one of the premises, the former Cedars-Sinai Hospital (Cedars), consisting of six connected buildings occupying a city block, lasted from 6 A.M. to 3 A.M. the next morning. The search of the other building, a residence and chapel known as the Fifield Manor (Manor), lasted from 6 A.M. until 10 P.M. Agents seized approximately 100,000 pages of documents and read hundreds of thousands more. Approximately 200 of the seized documents were used to obtain indictments against the defendants and, ultimately, to assemble a stipulated record upon which defendants' convictions were based.

A. The Search Warrants and Affidavit

The search warrants were premised upon a 35-page affidavit, incorporated by reference, of an F.B.I. agent, based almost entirely upon information provided by a former member of the Church of Scientology.[2] Also appended to the warrants was a "Description of Property" calling for the seizure of 162 documents or categories of documents at each of these locations. The last item, paragraph 162, directed the seizure of:

> Any and all fruits, instrumentalities, and evidence (at this time unkown) of the crimes of conspiracy, obstruction of justice and theft of government porperty [sic] in violation of 18 U.S.C. §§371, 1503 and 641 which facts recited in the accompanying affidavit make out.

The vast majority of documents were seized pursuant to the very broad language of paragraph 162 above.

B. The Execution of the Warrants

On July 7, 1977, briefings were held at the Los Angeles Field Office of the F.B.I. for 60 to 100 of the participating

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[2] The search warrants and affidavit are reproduced at Appendix F, 271a-377a.

agents. None of the many agents questioned at the suppression hearing had any clear recollection of what transpired at these critical briefings (J.A. 265-267). The only extant notes of the briefing, taken by Agent Oppy,[3] suggested the following: contrary to the limitations in the warrant, the agents were told to be alert for documents that might "be used for probable cause [to obtain a warrant] elsewhere";[4] despite the affidavit's specific designation of the place to be searched at the Manor as the sixth floor suite of Henning Heldt, the agents were told to search the entire sixth floor, and probably the seventh floor;[5] although the affidavit stated that the sought-after documents at Cedars were to be found in specific designated file cabinets located in specified portions of the ground floor offices of the Church "Information Bureau", the agents were told to search the file cabinets in the entire Cedars complex, room by room, floor by floor, and to search for documents in every desk, drawer, in-basket and cabinet on the ground floor.[6]

Some of the agents did not receive a copy of either the warrants or the affidavit.[7] Additionally, many of the agents who eventually participated in the seizure of documents missed the briefing specifically related to the interpretation of the warrants and the affidavit.[8]

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[3] Oppy, Tr. 7/16/79 at 901, 143; J.A. 1246-1255. (Reference to "Tr." are to pages in the transcripts of the testimony of the F.B.I. agents whose names precede the reference. These transcripts were part of the record before the court of appeals. References to "J.A." are to papers in the Joint Appendix filed with the court of appeals, a copy of which will be lodged with the Court upon request.)

[4] Oppy, Tr. 7/16/79 at 277-278; J.A. 1253.

[5] Oppy, Tr. 7/16/79 at 205-210, 216; J.A. 1289.

[6] Oppy, Tr. 7/16/79 at 204, 207; Calley, Tr. 8/23/79 at 117-121, 250-251; J.A.

[7] *E.g.*, Esparza, Tr. 8/22/79 at 23, 53; Calley, Tr. 8/23/79 at 12.

[8] Valencia, Tr. 6/21/79 at 109-113; Brien, Tr. 8/16/79 at 118.

After the search began at Cedars, it was decided that additional agents were needed. Approximately 50 agents joined the Cedars search, none of whom had any prior knowledge of the search or affidavit.[9] The late arriving agents were not given the warrants or affidavits,[10] and received only a short briefing from Agent Calley[11] who himself was not knowledgeable about the complex warrants and affidavit.[12]

There were seven "team leaders" at the search, all of whom testified at the suppression hearing. Four of the team leaders and many of the agents testified that they believed that they could seize *any* evidence of *any* crime.[13] Thus, one team leader believed that agents could seize any document which, in their judgment, had been obtained by "covert" means, whether or not those means were legal.[14] One agent was concerned with evidence of "defamation of character",[15] another with infiltration of political groups, "blackmail" and "extortion",[16] and another agent was concerned with violations of state or local law.[17]

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[9] Calley, Tr. 8/24/79 at 37-40.

[10] Calley, Tr. 8/24/79 at 39.

[11] Calley, Tr. 8/24/79 at 37-40; Maryman, Tr. 8/24/79 at 125, 129-130, 146, 154; Harmon, Tr. 8/24/79 at 88A-89; Dietzen, Tr. 8/27/79 at 61, 138.

[12] For example, Agent Calley instructed the late arriving agents to seize documents "that tended to indicate the Church [of Scientology] was involved in a defamation of anyone's church" (Calley, Tr. 8/24/79 at 41). Some of the agents later testified that they did not know the meaning of such basic terms in the warrants as "FOI" [Freedom of Information Act].

[13] Oppy, Tr. 7/16/81 at 256, 272; Stovall, Tr. 7/18/79 at 5603; Kiley, Tr. 8/27/79 at 35-36; Benavidez, Tr. 8/17/79 at 214-217, 221.

[14] Kiley, Tr. 8/27/79 at 332, 338.

[15] Calley, Tr. 8/24/79 at 41.

[16] Linker, Tr. 8/21/79 at 30.

[17] Oppy, Tr. 7/16/79 at 306.

Two of the team leaders testified that they seized evidence which was "possibly" evidence of crime.[18] Some of the agents were instructed by the agent in charge of the Cedars search to seize *any* documents concerning individual F.B.I. agents, regardless of the nature of the document.[19] Other agents appear to have assumed that mention of a government agency in the affidavit or the search warrants justified the seizure of any documents whatsoever relating to that agency.[20] Another agent believed that he should seize documents showing "infiltration" of a political group to "sway its thinking" although he acknowledged that this is not a crime.[21] Approximately half of the late arriving agents were assigned to a team leader who gave them instructions to seize "internal" documents of the American Medical Association, which were nowhere mentioned in the warrants.[22]

With these perceptions, the searches began.

At Cedars, there was an initial preliminary search of the entire massive Cedars complex.[23] There then followed searches in the Information Bureau where doors were smashed in, and crowbars and sledge hammers and

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[18] Oppy, Tr. 7/16/79 at 25; Benavidez, Tr. 8/17/79 at 215.

[19] Kiley, Tr. 8/27/79 at 36; Varley, Tr. 8/27/79 at 277.

[20] *E.g.*, Brunson, Tr. 8/29/79 at 82-87; Esparza, Tr. 8/22/79 at 79; Kiley, Tr. 8/27/79 at 35, 38-39; Linker, Tr. 8/21/79 at 68; Def. Exs. 498, 664, 666. (Reference to "Def. Exs." are to defense exhibits introduced at the suppression hearings. These exhibits were part of the record before the court of appeals).

[21] Linker, Tr. 8/21/79 at 64-65.

[22] Keller, Tr. 8/27/79 at 534; Dietzen, Tr. 8/27/79 at 140-141.

[23] During the course of this initial search, the agents seized floor plans from the offices of a building architect (Ymaz, Tr. 7/10/79 at 108, 111, 123; Def. Exs. 216, 217) and searched every desk and file cabinet in the office located across the hall from the Information Bureau. (Calley, Tr. 8/24/79 at 70; Bender, Tr. 7/11/79 at 17.)

bolt cutters used to open locks.[24] Additionally, areas *not* mentioned in the warrants were broken into, such as the Telephone Room and the Action Bureau.[25]

Every file drawer and every square inch of space within each room of the Information Bureau was searched, despite the fact that information in the underlying affidavit specified certain files and areas. No specific procedures were followed in looking for and seizing documents. No running log was kept of documents found in the description of property, or even those specifically identified in some of the specified documents.[26] There were no systematic methods established to review folders of documents and, on many occasions, an entire folder, containing hundreds of documents, would be seized if an agent believed that a single document was covered by the warrants.[27] Few copies of the warrants were available and at least one team had no copy of the underlying affidavit.[28] Documents relating to the American Medical Association and the Better Business Bureau were seized, though no such documents were listed in the Description of Property.[29] Similarly, a decision was made to seize all documents with the words "Red Box" on them because an agent came across a document which purported to describe a filing system in which certain documents had been removed from the Information Bureau and placed

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[24] Calley, Tr. 8/23/79 at 285.

[25] Oppy, Tr. 7/16/79 at 248-249.

[26] Varley, Tr. 8/27/79 at 273; Keller, Tr. 8/27/79 at 326; Oppy, Tr. 7/16/79 at 228-230.

[27] Oppy, Tr. 7/16/79 at 298, 7/17/79 at 480; Benavidez, Tr. 8/17/79 at 153; Esparza, Tr. 8/22/79 at 63; Valencia, Tr. 8/21/79 at 141, 198; Harmon, Tr. 8/24/79 at 100; Kiley, Tr. 8/27/79 at 39, 44.

[28] Oppy, Tr. 7/16/79 at 287.

[29] Dietzen, Tr. 8/24/79 at 137-139; Linker, Tr. 8/21/79 at 29; Keller, Tr. 8/27/79 at 334.

in files elsewhere in Los Angeles.[30] As a result, thousands of documents were seized simply because they were located in files with the words "Red Box" on them. Throughout the search, hundreds of photographs were taken.

A simultaneous search was conducted at the Manor. Every desk, every file cabinet and every container in the suite of defendant Henning Heldt was searched. No effort was made to limit the search to the "program files"—the only files described in the affidavit as being at the Manor—even though the agents saw and photographed a door with the sign "Programs Office" on it.[31]

The search warrant for the Fifield Manor limited the search to "the suite of offices of Mr. Henning Heldt", and stated the precise location of the Heldt office (App. A, 51a). The F.B.I. agents nevertheless searched the office of petitioner Hubbard's private secretary, Ms. Janet Lawrence, a free-standing "penthouse" or "hut" built upon the roof extending outside Mr. Heldt's office (*id.*, 51-53a). The agents seized numerous documents from approximately nine file cabinets, five desks, three closets and assorted piles of documents and papers in the penthouse office (*id.*, 34a; J.A. 1273-1277).

As a result of these searches, 99,000 pages of documents were seized, comprising more than 48,000 discreet documents, including legal pleadings and correspondence, political materials such as lobbying plans, confidential parishioner files and thousands of documents legitimately obtained through the Freedom of Information Act. Of these documents, over 40,000 pages were subsequently returned by the government.

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[30] Calley, Tr. 8/24/79 at 42.

[31] Def. Ex. 378.

C. The Relevant Judicial Decisions Regarding the Searches

On August 24, 1979, Chief Judge William B. Bryant of the United States District Court for the District of Columbia, ruled that a search warrant identical to those in the present case was a facially unconstitutional "general warrant" due to the language in paragraph 162. *In Re Search Warrant Dated July 4, 1977,* Misc. No. 77-151.[32] The court of appeals reversed the finding of facial invalidity, holding that paragraph 162 of the warrant incorporated the affidavit by reference, and thus limited the scope of the evidence which could be searched for and seized. *In Re Search Warrant Dated July 4, 1977,* 572 F.2d 321, 324 (D.C. Cir. 1977).

The Church's suggestion for rehearing *en banc* was denied. 572 F.2d at 328. In a statement as to why he did not request a vote upon the suggestion for rehearing *en banc,* Judge Wright, joined by Judges Bazelon and Leventhal, observed that "in the interest of reducing increasing delay in this litigation, I think the case should now be passed on to the Supreme Court." 572 F.2d at 329.[33] This Court denied the Church's petition for writ of certiorari. 435 U.S. 925.

The indictment in this case followed. Petitioners moved to suppress the fruits of the search, challenging both the facial validity of the warrants and the manner of execution of the search. The district court upheld the warrants, citing the prior decision of the court of appeals as "controlling precedent". (App. C, 134a.) The district court also

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[32] Judge Bryant was presiding over a motion made pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure by the Founding Church of Scientology of Washington, D.C., seeking return of documents seized pursuant to the same search warrant, executed at the Church's premises in Washington simultaneously with the searches in California at issue here.

[33] In a separate statement, Judge Spottswood W. Robinson, III, cautioned against inclusion of language similar to paragraph 162 in future warrants, but did not request a vote on the suggestion for rehearing.

denied *in toto* all challenges by the petitioners to the execution of the warrants.[34]

The court of appeals affirmed the district court's opinion upholding the search and seizure. On the question of the adequacy of the warrant, it held to be controlling its prior decision in *In Re Search Warrant.*

On the question whether the actual conduct of the agents constituted a general search requiring the entire fruits of the search to be suppressed, the court held that only "a flagrant disregard for the limitations in a warrant" would support such a finding (App. A, 43a). The court then determined, by reference to three criteria, that the searching agents had not displayed such flagrant disregard.

First, the court of appeals examined whether the searching agents had been properly prepared for the search. It conceded that "where, as here, the terms [of a warrant] are numerous, complex and potentially overbroad unless limited by the specifications of an extensive affidavit, the need for careful preparation on the part of those searching is essential." (App. A, 47a.) The court held that the agents present at the briefing the day before the search "were provided with as much preparation and information as was reasonable under the circumstances." (*Id.* 48a.) The court found, however, that the over fifty agents who joined the search several hours late "were given neither a meaningful opportunity to read the warrant and affidavit, nor any sort of comprehensive briefing of their terms, before beginning their mission." (*Id.*) The court held, nevertheless, that the search only "approached the limits of constitutional accept-

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[34] The petitioners argued unsuccessfully, *inter alia*, that the agents conducted a general exploratory search, that massive amounts of documents were seized outside the scope of the warrants, that the agents exceeded the geographic scope of the warrants, and that the agents used excessive force in violation of 18 U.S.C. §3109.

ability". (*Id.*, 49a.) It upheld the search on the ground that the unbriefed agents represented less than one-half the total of those searching (*id.*), and that such agents "worked alongside and in conjunction with" the other agents "who had been satisfactorily briefed". (*Id.*, 50a.)

Second, the court of appeals also viewed the challenge to the penthouse search as a "serious allegation of geographic overbreadth", but held (over the disagreement of Judge Wald) that the search of that office was not outside the geographic limitation of the warrant (App. A, 50-51a, 55a). In so holding, the court referred to several "factors" [35] relied upon by the district court, and concluded that the district court's finding "is not clearly erroneous and must be sustained". (*Id.*, 55a). The panel stated:

> [*T*]*his search does not constitute evidence of flagrant disregard for the warrant. The agents did not act capriciously or wantonly* in searching the Lawrence office. On the contrary they entered only after an Assistant United States Attorney was consulted by the agents in charge, and a deliberate collective decision was made to proceed, a decision not without some *good faith*, rational basis.

(App. A, 55a, fns. omitted, emphasis supplied.)

The court further held that even if the search of the penthouse office were illegal, Mrs. Hubbard's conviction was not affected because "none of the documents seized

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[35] These factors were: 1) "From the vantage point of an agent attempting to locate the boundary of the Heldt suite, it would be reasonable to assume that this hut, right outside the doors of the Heldt office, would be part of the suite"; 2) since the nearest entrance to the hut was reached through the Heldt office "*it was logical to assume*" that those offices formed a unit; 3) Janet Lawrence testified that Mrs. Hubbard's staff in the hut utilized the restroom in the Heldt office; and 4) the hut was unmarked, "thus, there was nothing to indicate that it did not constitute part of the Heldt suite. (54a, emphasis supplied).

from Mrs. Lawrence's office were used as evidence-in-chief by the prosecution" and Mrs. Hubbard had not made a "colorable argument" that they were used in any other fashion by the government (*Id.*, 55a, n. 55.)

In a separate opinion Judge Wald concluded that the entry of the penthouse office *was* outside the scope of the warrant and thus unlawful, because "Mrs. Lawrence's office was nowhere mentioned in the warrant and the searching officers could not reasonably have believed that her office constituted part of the "suite of offices of Mr. Henning Heldt" (App. A, 104a).

Finally, the court of appeals considered whether the searching agents had exceeded their authority by seizing items not mentioned in the warrant. It held that the seizure of such documents could be justified by the "plain view" doctrine if the agents were lawfully within the geographical limitations set out in the warrant, if the documents seized "possess[ed] an incriminating character plainly and immediately apparent" on their face, and if the agents came "upon the unspecified items inadvertently." (App. A., 57a-58a.)

The court held without analysis that the first limitation on the "plain view" exception was met. With respect to the "incriminating character" requirement, the court of appeals regretted "that the district court failed to note with specificity how many documents were taken pursuant to the plain view doctrine, or how many of those seized under plain view actually met the incriminating character requirement." (*Id.*, 60a.) The court of appeals recognized "the possibility that many documents were improperly seized under the plain view doctrine." (*Id.*, 61a.) The court held, however, that it did not matter how many documents were improperly seized, so long as the searching agents made a good-faith effort to stay within the boundaries of the warrant.

> Assuming *arguendo* that numerous documents . . . failed to meet the incriminating character limitation, we would still not hold that total suppression is required in this case. . . . [W]e believe here that the reasonableness of the execution of a search can be determined from the subjective and objective behavior of the participants during the search, as revealed by eye witness testimony. . . . Thus a good faith attempt to stay within the boundaries of an inherently broad warrant will support a finding that the search—taken as a whole—was reasonable, even though a majority of documents seized might turn out not to qualify for inclusion on more leisurely reflection.

(*Id.*, 62a.) The court adopted a similar analysis with respect to the inadvertence limitation. It noted that the limitation "has been subjected to substantial scholarly criticism, . . . and has been unevenly applied by courts." (*Id.*, 59a.) It held that the limitation stands for nothing more than "that agents must act in good faith to confine themselves to searching for the specified items." (*Id.*)

The court held that with respect to both the incriminating character and the inadvertence limitations, its good-faith test was met.

2. *The Violations of the Disposition Agreement*

Following denial of the suppression motions, the defendants entered into a disposition agreement with the government providing, *inter alia*, that each defendant submit to a guilty verdict on a single count of the indictment upon a stipulated record of evidence (App. A, 83a). When the government repudiated the disposition agreement, the defendants moved to enforce it.

At an evidentiary hearing on the motion, Mrs. Hubbard's counsel testified under cross-examination that the govern-

ment's position during the disposition negotiations was that his client need not receive a jail sentence (*Id.*, 84a-85a).

The district court ruled that the parties had reached a disposition agreement, and enforced the agreement with the following proviso limiting government allocution:

> The government retains the right to allocute on matters in any fashion it chooses as to all defendants except the defendant Hubbard. As to the defendant Hubbard, the government agrees to advise the Court as follows: "the government takes no position and is making no request in the matter of sentence with respect to the defendant Hubbard." It is understood that Mrs. Hubbard through her counsel will make no statement in allocution concerning the facts of the case. It is further agreed that as to any defendant, including Mrs. Hubbard, the government may dispute any statements of fact on any matter with which it has disagreement. . . .

(*Id.*, 83a.)

Shortly thereafter, the government filed a "motion for reconsideration" which argued that the court had erroneously precluded the United States Attorney from testifying at the hearing, and which proffered the United States Attorney's belief "that Mrs. Hubbard should receive a jail sentence, especially since she was at the head of the conspiracy." (*Id.*, 87a). The government's motion for reconsideration was denied. Mrs. Hubbard filed a motion for an order under *Santobello* v. *New York*, 404 U.S. 257, transferring her case to a different judge for sentencing because the government had violated the disposition agreement by allocuting against her in its motion to reconsider. Mrs. Hubbard's co-defendants, including petitioner Snider, filed a separate motion seeking transfer of their sentencing to another judge.

The government repeated its allocution against Mrs. Hubbard by arguing to the probation office that the relative culpability of the defendants paralleled their respective positions in the Church of Scientology's organizational structure. The probation office, in turn, conveyed the government's position to Judge Richey in the presentence reports of Mrs. Hubbard's co-defendants. Since the government previously had informed the court of its belief that Mrs. Hubbard was the highest ranking Church official amongst the defendants, she moved to withdraw from the disposition agreement.[36] Mrs. Hubbard's co-defendants filed a separate motion for transfer of their sentencing to another judge (J.A. 1063). While these motions were pending, the government compounded its violations of the agreement not to allocute by stating in its sentencing memorandum:

> This and all other references to "the defendants" applies to all defendants except defendant Mary Sue Hubbard *since the United States has been held* to have agreed not to take a position as to her sentencing.

(J.A. 634, emphasis supplied.)

This further breach of the allocution provision was the subject of a supplement filed by Mrs. Hubbard to her motion to vacate the plea agreement.

Mrs. Hubbard's motion and the motion of her co-defendants were denied eleven days after Mrs. Hubbard was sentenced to the maximum prison term and fine permitted by the statute under which she was convicted.

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[36] Mrs. Hubbard sought either outright dismissal of the indictment, or, in the alternative, a jury trial before a different judge, or sentencing by a judge in a different district who would be unaware of the government's violation of the disposition agreement (J.A. 1065).

Although Mrs. Hubbard raised the issue of all three separate government allocutions upon her appeal, the court of appeals addressed only the allocution appearing in the government's "motion to reconsider" the court's enforcement of the disposition agreement:

> [The opinion of the United States Attorney that Mrs. Hubbard was the head of the conspiracy and should be incarcerated] was a direct response to the testimony of Hubbard's counsel that the government 'did not want Mrs. Hubbard to go to jail.' That statement constituted an anticipatory allocution on behalf of Hubbard. Believing as it did that the statement was a misrepresentation of its position, the government was under a duty to dispute it. In so doing, the government properly availed itself of the proviso in the settlement agreement "that as to any defendant, including Mrs. Hubbard, the government may dispute any statements of fact on any matter with which it has disagreement." Had the government failed to challenge defense counsel's representation the court in passing sentence would have acted on a factual premise that in the government's view was false; and no disposition agreement could require the government to permit that to happen.

(App. A, 88a.)

3. *The Motion for Recusal*

Prior to sentencing the defendants moved pursuant to 28 U.S.C. § 455, to recuse the trial judge from the sentencing process, or, in the alternative, for a hearing on the issue of recusal. The ground for the motion was that the district judge falsely had stated, upon inquiry by defense counsel, that the extraordinary security measures he had instituted at the pre-trial suppression hearings were unrelated to the present case (App. A, 63a). The dis-

trict court denied the motion without a hearing, even though the defendants proffered substantial evidence to support their claim that the court had not been truthful in its explanation of the security measures (App. A, 65a, 69a).

Subsequent to sentencing, the court of appeals granted the defendants' motion to supplement the record on appeal to include additional evidence of deception, and independent evidence of bias or prejudice on the part of the district judge (App. A, 70a, n. 73). In principle part, this independent evidence consisted of an affidavit by Associate Dean John R. Kramer of Georgetown University Law Center, which recounted a conversation Mr. Kramer had with Judge Richey one week before the sentencing. In that conversation, Judge Richey was reported to have engaged in a "critical and hostile monologue about the defendants", and to have stated "these people are threatening me." [37]

[37] The affidavit is contained in petitioners' motion papers before the court of appeals.

The court of appeals accepted as true the defendants' claim that the district judge had not been truthful in his explanation of the security precautions, but held that such deception was not sufficient evidence of "personal bias or prejudice" to warrant even a hearing, let alone recusal.[38] The court declined to consider the import of the Kramer affidavit because, in its view, it was unnecessary for it to do so in light of its acceptance of the allegations of deception on the security precautions question.

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[38] In particular, the court of appeals held that it was not persuaded that the source of the trial judge's fear, leading to the security precautions, was "extra judicial" (App. A, 70a), and that the falsehood did not create an appearance of bias because the subject matter of the falsehood "has no bearing on the case" (App. A, 72a).

Reasons for Granting the Writ

I

This Case Presents Issues of Exceptional Importance Under the Fourth Amendment Concerning the Limitations Upon the Scope of a Search and Seizure Pursuant to a Concededly Broad Warrant, and the Application of a Novel "Good Faith" Doctrine to Excuse an Overbroad Search and Bar Application of the Exclusionary Rule. The Court of Appeals Opinion Improperly Extended This Court's Holding in *Andresen* v. *Maryland*, 427 U.S. 463, and Conflicts With Other Decisions of This Court and Other Circuits.

This case presents the classic example of a general exploratory search prohibited by the Fourth Amendment. The opinion of the court of appeals upholding the search is an improper and dangerous extension of this Court's decision in *Andresen* v. *Maryland*, 427 U.S. 463, and ignores the specific limitations and warnings of the *Andresen* Court.

In *Andresen*, this Court held constitutionally permissible a search for documents pursuant to a warrant which exhaustively listed particular documents to be seized, and additionally directed seizure of "other fruits, instrumentalities and evidence of crime at this [time] unknown." The court found that the warrant itself specifically limited the "other fruits" clause to a particular group of identifiable documents, 427 U.S. at 481-82, and that the search and seizure were conducted by highly trained agents familiar with the investigation who therefore were able to evaluate whether the papers searched were "other fruits" of the crime under investigation. *Id.* at 483-84. This Court warned, however, that document searches must be narrowly confined, and that "responsible officials including judicial officials, must take care to assure that they are conducted in a

manner that minimizes unwarranted intrusions upon privacy." 427 U.S. at 482, n.11.

The court of appeals in this case upheld the facial validity of the search warrant on the basis of *Andresen*, despite the fact that the rambling affidavit in no way limited the "any and all fruits" clause of the warrant to documents concerning particular transactions, as was done in *Andresen*, and despite the fact that the clause did not relate, as it did in *Andresen*, to a specific criminal action, but rather in an open-ended way to evidence of conspiracy and other crimes. Such a warrant inevitably encouraged the searching agents to seek out and seize evidence of any and all crimes which they might imagine, rather than particular evidence relating to a particular crime or crimes.

Even worse, the court of appeals, while paying lip service to the minimization requirement of *Andresen*, utterly failed to apply it in a manner in which it would have any meaning. It overlooked the grossly inadequate preparation of the searching agents, most of whom did not know or understand the limitation of the warrant; it declined to determine the extent to which the searching agents seized documents outside the scope of the warrant; it ignored the fact that the searching agents exceeded the geographical limitations of the warrant; and it justified the entire search by its finding that the searching agents acted in "good faith" in carrying out the mandate of "an inherently broad warrant" (App. A, 62a.) As a result, the court of appeals decision removes any significant limitations on the authority of searching agents to seize documents, thereby eviscerating the Fourth Amendment requirements that a search warrant be issued by a neutral and detached magistrate,[19]

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[19] *United States* v. *United States District Court*, 407 U.S. 297, 321; *Coolidge* v. *New Hampshire*, 403 U.S. 499, 550; *Johnson* v. *United States*, 333 U.S. 10, 13-14.

and that no discretion be vested in the searching officers.[40]

1. The court of appeals rendered meaningless the minimization requirement of *Andresen* by glossing over and attempting to explain away the inadequate preparation of the searching agents and their unfamiliarity with the limitations of the warrant and the affidavit. The court chose to highlight the evidence of how almost half of the searching agents were instructed the day before the search, ignoring the testimony of the briefed agents at the suppression hearing that they had no clear recollection of the briefings, and that they searched for and seized evidence of any crime or improper act. The court of appeals excused the fact that about fifty of the agents who actually conducted the search, never read the warrant or affidavit and received only a fifteen minute briefing, on the grounds that they comprised less than half the total searching agents and worked alongside the other agents.[41]

If search warrants for documents containing "any and all fruits" clauses are to be permitted by reference to explanatory affidavits which particularize the items to be seized, the courts must insist that the searching agents genuinely are fully apprised of the limits of the search. Otherwise, the "any and all fruits" clause of the warrant serves as an invitation to a general search, especially in a conspiracy investigation where probable cause is easily alleged. Certiorari should be granted to restore the necessary minimization rule of *Andresen* and the Fourth Amendment.

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[40] *Lo-Ji Sales Inc.* v. *New York*, 442 U.S. 319, 325; *Roaden* v. *Kentucky*, 413 U.S. 496, 502; *Stanford* v. *Texas*, 379 U.S. 476, 485; *Marron* v. *United States*, 275 U.S. 192, 196.

[41] There was no evidence that the unbriefed agents were limited in the scope of their search by the briefed agents, and no evidence as to what percentage of the seized documents were seized by the unbriefed agents.

2. The court of appeals' application of the plain view doctrine to a document search for "any and all fruits" of conspiracy or other crimes raises novel and serious questions under the Fourth Amendment, requiring the plenary consideration of the Court.

A search of documents for "all fruits" necessarily requires perusal of all documents at the location of the search to determine which should be seized. This is particularly true if the agents are authorized to look for documents which might be evidence of conspiracy, given the virtually open-endedness of that crime. Such a perusal of documents for their content is itself a massive search and invasion of privacy. If, in addition, the searching agents are permitted to seize those documents not within the limits of the affidavit or warrant on the grounds that they were in "plain view" and might constitute evidence of other crimes, then there remains no effective limitation on the scope of the search. The result is a general exploratory search and seizure, which is precisely what happened in this case.

It is essential that this Court address the question of meaningful limitations upon the application of the "plain view" doctrine in such a context. The court of appeals was without current guidance on the question, and struggled unsuccessfully to resolve it, holding merely that the "searching agents must act in good faith to confine themselves to searching for specified items." (App. A, 59a.)

The "good faith" limitation is meaningless not only because it is unenforceable, but also because it fails to address the fundamental doctrinal problem: the inevitable conversion of a search for evidence of a particular crime into a general search for evidence of all crime. That problem, which became critical following this Court's limited approval of an "all fruits or evidence" clause in *Andresen*, must be considered by this Court.

3. The court of appeals opinion eviscerates the exclusionary rule and sanctions general exploratory searches for evidence of all crime, beyond the limitations of a warrant, by creating an unprecedented rule that the question of whether a search comports with the limitations of a warrant is to be judged solely by the "good faith" of the searching officers.

The court of appeals applied this novel standard both to the question of whether the searching agents seized documents not encompassed in the warrant and affidavit, and to the question of whether they searched and seized documents beyond the geographic scope of the warrant.

Thus, with respect to the first question, the court of appeals conceded "the possibility that many documents were improperly seized" (App. A, 61a), and regretted that the district court had failed to make "a finding based upon an actual examination of the questioned documents" as to whether such documents were properly seized (App. A, 61a). Rather than undertake such an analysis itself or remand to the district court for further suppression hearings, however, the court of appeals held that such an inquiry was irrelevant. "Assuming *arguendo* that numerous documents" were improperly seized, the court held that:

> a good faith attempt to stay within the boundaries of *an inherently broad warrant*[42] will support a finding that the search—taken as a whole—was reasonable, even though a majority of documents seized might turn out not to qualify for inclusion on more leisurely reflection.

(App. A, 62a, emphasis supplied.)

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[42] It should be noted that the court in major part justified the discretion it reposed with the searching agents on the ground that the warrant itself was too broad to expect them to execute it with any degree of precision.

Similarly, with respect to the geographical limitations of the warrant, the Court held that the search of Mrs. Hubbard's office did not evidence "flagrant disregard for the warrant", because the agents did not act "capriciously or wantonly" or "without some good faith or rational basis." [43]

The decision of the court of appeals poses a direct and serious threat to the "particularity" requirement of the Fourth Amendment. For the first time a federal appellate court has held that agents acting pursuant to a search warrant particularly stating the place to be searched and the items to be seized may subjectively interpret the warrant, and will be upheld in the absence of bad faith or flagrant disregard for the warrant.

This court has previously and recently rejected such a test. *Scott* v. *United States*, 436 U.S. 128. While several courts in recent years have considered and divided over the applicability of a good faith exception to the exclusionary rule, they have done so only in the context of a failure to meet the requirement of probable cause.[44] Indeed, even the Fifth Circuit, which has embraced the good faith exception enthusiastically in the probable cause context, has not applied it to situations where warrants have been procured properly but have been improperly executed. *United States* v. *Williams*, 622 F.2d 830, 840 n.1 (5th Cir. 1980), *cert. denied*, 449 U.S. 1127.

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[43] Employing the same improper standard, Judge Wald reached the opposite conclusion—that the agents could not "reasonably" have believed that the penthouse office was authorized to be searched.

[44] *See, e.g., United States* v. *Astroff*, 578 F.2d 133 (5th Cir. 1977) *(en banc)* (good faith exception applied); *United States* v. *Thomas*, 489 F.2d 664 (5th Cir. 1973), *cert. denied*, 423 U.S. 844 (exception applied); *United States* v. *Rosenberger*, 536 F.2d 715 (6th Cir. 1976) (exception applied), *cert. denied*, 431 U.S. 965; *United States* v. *Marihart*, 492 F.2d 897 (8th Cir. 1974), *cert. denied*, 419 U.S. 827 (exception applied); *United States* v. *Hole*, 564 F.2d 289 (9th Cir. 1977) (exception applied); *United States* v. *Karathanos*, 531 F.2d 26 (2d Cir. 1976), *cert. denied*, 428 U.S. 910 (exception rejected).

This impermissible vesting of discretion in the hands of the searching agents is particularly egregious in the context of the present case—a document search at the premises of a religious organization. This Court has recognized that document searches are especially intrusive, *Andresen* v. *Maryland*, 427 U.S. 463, 482, n.11, and that such searches must comport to the requirements of the Fourth Amendment with "scrupulous exactitude." *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 564, *reh. den.* 439 U.S. 885; *Stanford* v. *Texas*, 379 U.S. 476, 485.

Rather than requiring the strictest adherence to the warrant, the court of appeals has instead announced a new permissive standard importing discretion to the searching agents. To abandon established principles in favor of a "good faith" standard is so radical a departure from both this Court's rulings and the historic purposes of the Fourth Amendment as to require plenary review by this Court.

4. The question of whether the proper remedy for a grossly overbroad search pursuant to a warrant is total suppression or suppression merely of the items seized outside the warrant (denominated as "severance") is not only "a difficult issue of Fourth Amendment jurisprudence," but also one on which there "exists a curious division of opinion between the federal and state courts . . ." *United States* v. *Giresi*, 488 F.Supp. 445, 459 (D.N.J. 1980). The court of appeals held that it would apply total suppression only if the agents exhibited "flagrant disregard" for the warrant (App. A, 43a).[45] Compare Judge Coolahan's somewhat different—and unclear—standard in *Giresi* that the severance rule will not be invoked where "the warrant under

[45] The court of appeals itself flagrantly disregarded the agents disregard for the warrant, most notably failing to acknowledge the significance of the fact that the government itself returned over 50,000 of the seized documents in apparent recognition of the massive overbreadth of the search.

consideration is *dangerously akin* to a general warrant." 488 F.Supp. at 460 (emphasis supplied).

Application of the "severance" rule totally eviscerates the "fruit of the poisonous tree" doctrine. *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385; *Nardone* v. *United States,* 308 U.S. 338; *Alderman* v. *United States,* 394 U.S. 165. Where the government unlawfully has seized evidence, the defendants at the least are entitled to a hearing to determine the extent to which other evidence, or indeed the entire prosecution, was tainted by improperly seized evidence. The court of appeals, to the contrary, excused the illegal seizure of many documents by application of its "flagrant disregard" standard, and failed even to address the question of "taint."

The interrelationship between the "severance" and "poisonous tree" doctrines presents a critical question upon which there are no observable standards, requiring the guidance and clarification of this Court.

II.

The Court of Appeals Decision Upholding the Government's Three Allocutions Against Mrs. Hubbard Threatens the Integrity and Viability of the Plea Bargaining Process, and Is in Direct Conflict With the Decisions of Other Circuits.

1. The court of appeals ruled that a statement by defense counsel prior to the enforcement of the disposition agreement constituted an "anticipatory allocution," justifying a damaging government response *after* enforcement of the agreement. This unprecedented holding will have damaging consequences for the plea bargaining process. It would render agreements by the government not to allocute unenforceable, unless defense counsel had observed total

silence from the onset of the case. As a result, the decision will act as a significant disincentive for defendants to enter into plea agreements, since restrictions upon government allocution are commonly the significant consideration for a guilty plea or other voluntary disposition. The decision thus undermines this Court's decision in *Santobello* v. *New York*, 404 U.S. 257, recognizing the "highly desirable" role of plea bargaining in the criminal justice system.

2. The court of appeals did not address and therefore sanctioned the government's argument to the court, transmitted through the probation office by means of the presentence reports of Mrs. Hubbard's co-defendants, that Mrs. Hubbard was the most culpable defendant. The court of appeals' decision was contrary to the general rule announced in *Santobello* v. *New York*, requiring rigid government compliance with a non-allocution provision of a disposition agreement, and to the holding in *United States* v. *Shanahan*, 574 F.2d 1228 (5th Cir. 1978), where the Fifth Circuit vacated a sentence because the government had furnished information inconsistent with the terms of a plea agreement to the presentence investigating agency, which, in turn, conveyed it to the sentencing judge.

3. The court of appeals also ignored the government's statement in its pre-sentence memorandum that "the United States has been held to have agreed not to take any position as to [Mrs. Hubbard's] sentencing." The court of appeals' decision is in direct conflict with three circuits which have reversed convictions on the basis of similar statements. *United States* v. *Brown*, 500 F.2d 375 (4th Cir. 1974) (prosecutor agreed upon sentence recommendation because "that was part of the plea bargain"); *Cohen* v. *United States*, 593 F.2d 766 (6th Cir. 1979) (prosecutor stated that his office had "bound itself" not to oppose parole); *United States* v. *Grandinetti*, 564 F.2d 723 (5th Cir. 1977) (state-

ment by Assistant United States Attorney that his office was "locked-in" by a written agreement).

III

The Court of Appeals Affirmance of the Dismissal of Petitioners' Recusal Motion Raises Novel and Important Questions Concerning the Application of 28 U.S.C. § 455.

As a critical component of the statutory and constitutional scheme to ensure that justice is impartially administered in fact as well as appearance, 28 U.S.C. § 455 is of significance to all litigants.[46] The scheme established by § 455 is primarily a self-enforcing one. *See, e.g., Davis* v. *Board of School Commissioners of Mobile County,* 517 F.2d 1044 (5th Cir. 1975), *cert. denied,* 425 U.S. 944. It is to the federal courts alone, and thus ultimately this Court, that the power to police judicial conduct has been entrusted.

Petitioners presented two kinds of evidence of possible "bias or prejudice." First, there was substantial evidence that the trial judge had been untruthful in explaining the reasons for imposing unusual security precautions at the suppression hearing, a fact which, defendants argued, suggested at least the appearance of bias or prejudice. Second, the Kramer affidavit was competent evidence that the trial judge in fact was biased or prejudiced, or gave the appear-

[46] This Court has stated that "[a] fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison,* 349 U.S. 133, 136. Fairness, of course, requires not only "an absence of actual bias in the trial of cases" but also the absence of "even the probability of unfairness." *Id.* "[J]ustice must satisfy the appearance of justice." *Offutt* v. *United States,* 348 U.S. 11, 14. *See Public Utilities Commission* v. *Pollak,* 343 U.S. 451, 467 (Statement of Frankfurter, J.); *Commonwealth Coatings Corp.* v. *Continental Casualty Co.,* 393 U.S. 145, 149-60. This sense of impartiality is particularly important at time of sentencing. *United States* v. *Baker,* 441 F.Supp. 612 (N.D. Tenn. 1977).

ance of being so. The defendants argued that on the basis of the affidavit, at the least a further evidentiary inquiry was required.

The court of appeals decided that it need not consider the factual validity of defendants' evidence that the district judge concealed the truth about the security precautions, holding that, even if true, such concealment by itself did not give an appearance of bias or prejudice. But the court of appeals failed to address even the existence of the Kramer affidavit, which not only colors analysis of the effect of the security precaution deception, but constitutes independent direct evidence of bias or prejudice. If the facts of the Kramer affidavit are true, petitioners submit that recusal was required under § 455.

This case thus raises serious questions about the substantive standards to be applied and procedures to be followed under § 455. If criminal defendants are not entitled to at least a hearing upon showing facts such as those shown here, the statutory scheme is rendered meaningless. Since § 455 is essential to public confidence in the impartiality of the criminal justice system, the Court should grant *certiorari* to resolve the critical questions raised herein.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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December 31, 1981

Appendix

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81-1227
No. .....

Supreme Court of the United States

OCTOBER TERM, 1981

MARY SUE HUBBARD and DUKE SNIDER,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-2442

UNITED STATES OF AMERICA

v.

HENNING HELDT and DUKE SNIDER, APPELLANTS

No. 79-2447

UNITED STATES OF AMERICA

v.

MARY SUE HUBBARD, APPELLANT

No. 79-2448

UNITED STATES OF AMERICA

v.

SHARON THOMAS, APPELLANT

No. 79-2449

UNITED STATES OF AMERICA

v.

GREGORY WILLARDSON, APPELLANT

No. 79-2450

UNITED STATES OF AMERICA

v.

RICHARD WEIGAND, APPELLANT

No. 79-2456

UNITED STATES OF AMERICA

v.

CINDY RAYMOND, APPELLANT

No. 79-2459

UNITED STATES OF AMERICA

v.

GERALD BENNETT WOLFE, APPELLANT

No. 79-2462

UNITED STATES OF AMERICA

v.

MITCHELL HERMANN, APPELLANT

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil No. 78-401)

Argued February 27, 1981

Decided October 2, 1981

Philip Hirschkap, with whom *Leonard S. Rubenstein* and *Geraldine R. Gennet* were on the brief, for appellants in No. 79-2442. Counsel presented argument on behalf of all appellants on the issues of search and seizure.

Earl C. Dudley, Jr. for appellants in Nos. 79-2456 and 79-2462. *Michael Nussbaum* and *Ronald Precup* also entered an appearance for appellants in Nos. 79-2456 and 79-2462.

Leonard Boudin, with whom *Eric Liberman* and *Dorian Bowman* were on the brief, for appellant in No. 79-2447.

John Zwerling with whom *Jonathan Shapiro* and *Diana Lee Evans* were on the brief for appellant in No. 79-2459.

Leonard J. Koenick was on the brief for appellant in No. 79-2448.

Roger E. Zuckerman and *Roger C. Spaeder* were on the brief for appellants in No. 79-2449 and 79-2450.

Steven C. Tabackman and *Melvyn H. Rappaport*, Assistant United States Attorneys, with whom *Charles F. C. Ruff*, United States Attorney, *John A. Terry*, *Michael W. Farrell*, *Raymond Banoun*, *Judith Hetherton* and *Timothy J. Reardon, III*, Assistant United States Attorneys, were on the brief for appellee.

Nadine Strassen was on the brief for Amicus Curiae, American Civil Liberties Union, urging reversal with respect to the search and seizure issue in Nos. 79-2442, 79-2447, 79-2448, 79-2449, 79-2450, 79-2452, 79-2456 and 79-2462.

Frederic R. Kellogg was on the statement in lieu of brief for Amicus Curiae, National Moratorium on Prison Construction, et al., in Nos. 79-2447, 79-2448, 79-2449, 79-2450, 79-2452 and 79-2462.

Before: MACKINNON, ROBB and WALD, *Circuit Judges*.

Opinion Per Curiam.

Opinion concurring in part and concurring in the result filed by *Circuit Judge* WALD.

PER CURIAM: Appellants,[1] members of the Church of Scientology ("Scientology"), were indicted for completed conspiracies and substantive offenses involving their plan to identify, locate and obtain by various illegal means certain documents in the possession of the United States which related to Scientology, and their efforts thereafter to obstruct justice by thwarting the government's investigation of such criminal activities, by harboring and concealing a fugitive from arrest, and by causing the making of false declarations under oath before a grand jury.[2]

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[1] The appellants are Henning Heldt, Duke Snider, Mary Sue Hubbard, Sharon Thomas, Gregory Willardson, Richard Weigand, Cindy Raymond, Gerald Bennett Wolfe and Mitchell Hermann. Two other defendants, Jane Kember and Morris Budlong, were in England, fighting extradition, when this case was tried. They were subsequently extradited on the burglary counts, and found guilty after a jury trial on nine counts of burglary.

[2] Appellants Hubbard, Heldt, Snider, Willardson, Weigand, Hermann, and Raymond were charged with conspiracy to steal property of the United States (18 U.S.C. § 641), to intercept oral communications (18 U.S.C. § 2511(1)(a)), to forge United States government credentials (18 U.S.C. § 499) and to burglarize offices of the Internal Revenue Service, the Department of Justice, and the Office of the United States Attorney for the District of Columbia (22 D.C. Code § 1801(b)), all in violation of 18 U.S.C. § 371 (Count 1). They were also charged with conspiracy to obstruct justice (18 U.S.C. § 1503), to obstruct a criminal investigation (18 U.S.C. § 1510), to harbor and conceal a fugitive (18 U.S.C. § 1071), and to make false declarations (18 U.S.C. § 1623), all in violation of 18 U.S.C. § 371 (Count 23), and with one count of interception of oral communications (Count 2), ten counts of burglary (Counts 3-8, 14-15, 19-20), ten counts of theft of United States property (Counts 9-13, 16-18, 21-22), and one count of obstruction of justice (Count 24). Appellant Wolfe was charged with the obstruction conspiracy (Count 23), the

Appellants' motion before the district court to suppress documentary evidence seized in searches of Scientology offices in California [3] was denied after an extensive hearing. Thereafter, on October 8, 1979, Judge Richey, over the government's objection, granted appellants' motion to require the government to comply with a Disposition Agreement to which appellants contended the government had agreed.[4] Under this Agreement, each appellant was to be found guilty by the court on one specified count on the basis of the "Stipulation of Evidence." Upon consideration of this uncontested evidence and in accordance with the Disposition Agreement, the court found appellants guilty as follows: Hubbard, Heldt, Snider, Willardson, Weigand and Wolfe, of conspiracy to obstruct justice and other offenses (Count 23); Hermann, of conspiracy to burglarize government offices and steal documents (Count 1); and Thomas, of misdemeanor theft of government property (Count 17).

On December 4, 1979, after the presentence reports were received, appellants moved for Judge Richey's recusal. Judge Richey declined to continue the sentencing of appellants pending his ruling on the motion, and appellants were sentenced on December 6 and 7.[5] The

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obstruction of justice count (Count 24), five of the burglary counts (Counts 3-5, 7-8) and five of the theft counts (Counts 9-13). He was also charged with four counts of false declarations (Counts 25-28) and was named as an unindicted co-conspirator in Count 1. Appellant Thomas was also charged in Count 1 (conspiracy), Counts 14-15 (burglary), and Counts 16-18 (theft). Michael Meisner was named by the grand jury as an unindicted co-conspirator in both conspiracy counts.

[3] A contemporaneous search of Scientology's offices in Washington, D.C. is not discussed because none of the documents seized in that search were offered in evidence in this case. *See* In re Search Warrant, No. 79-2138 (D.C. Cir. 1981).

[4] This Agreement, Joint Appendix [hereinafter "J.A."] at 356-58, is set forth as the Appendix to this opinion.

[5] All appellants except Thomas were sentenced pursuant to 18 U.S.C. § 4205. Appellant Hubbard was sentenced on Count

recusal motion was subsequently denied in a memorandum and order filed on December 14, 1979 (J.A. at 387-93). These appeals followed.[6]

The district court had previously ruled that

> defendants have agreed not to challenge the sufficiency of the evidence before the trial court or on appeal. That is, the defendants will not challenge the accuracy of the facts stipulated by the government, and the defendants will not assert that the facts alleged do not amount to a violation of the crime charged because of other considerations.

Memorandum Opinion filed October 8, 1979, at 11 (J.A. at 358). This permitted appellants to raise the constitutionality of the search on appeal, which they have done.

The facts giving rise to this case involve appellants' covert operations to steal government documents pertaining to Scientology and a conspiracy to obstruct justice in connection with those operations. This program was carried out by the defendants and others through what were termed the "Guardian Offices" of Scientology. To conceal evidence of their activities, defendants initiated the "Red Box" program by a general order dated 25 March 1977.[7] As indicated by the "Red Box" memoran-

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23 to a five-year term of imprisonment and fined $10,000. Appellants Heldt, Snider, Willardson, and Weigand were each sentenced on Count 23 to four year terms of imprisonment and each fined $10,000. Appellant Hermann was sentenced to a four year term of imprisonment on Count 1 and fined $10,000. Appellants Raymond and Wolfe were each sentenced on Count 23 to a five year term of imprisonment and each was fined $10,000. Appellant Thomas was sentenced on Count 17 to a fine of $1,000 and a one year term of imprisonment; six months of that sentence were suspended and she was placed on probation for five years.

[6] Under the Disposition Agreement the remaining charges remain outstanding pending disposition of the appeals.

[7] The "Red Box" program, as set forth in Government's Exhibit 219, stated:

[Continued]

dum (n.7), that program was primarily designed to secrete and destroy documentary proof that Mary Sue

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[7] [Continued]

7984
25 Mar, 1977

All concerned
BI staff

All Secs
DGI US OFFICE

VIA: DDGI US

RE: RED BOX

Dear All,

This is to introduce into BIUS [Bureau of Information, United States] the complete red box system. Most of you have heard of this earlier—I will now explain it in detail. First of all, all data that *is* red box data, has to be pulled from your areas. The complete definition of Red Box material is attached.

Secondly, you must ensure that none of your juniors, (for those of you who have them) have red box data in their areas.

All the red box material from your areas must be centrally located, together and in a moveable container (ideally a briefcase), locked, and marked.

When this is done in each area, we will divide up the amounts and deputize persons in the area to be responsible for its removal from the premises in the case of a raid. This procedure will be drilled. This procedure will stay in at the new location.

Please have all this data sorted and located in proper container by Monday night Mar 28. I will then divide up removal duties, and we will drill it Tuesday night just before the all hands.

Love Judy

(The exhibit also contains other handwritten comments.)

RED BOX DATA INFORMATION SHEET

1. What is Red Box data?

a) Proof that a Scnist [Scientologist] is involved in criminal activities.

[Continued]

Hubbard and her husband L. Ron Hubbard [8] engaged in any "illegal" or "incriminating activities." The existence

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[7] [Continued]

b) Anything illegal that implicates MSH, [Mary Sue Hubbard], LRH [L. Ron Hubbard].

c) Large amounts of non FOI docs [covertly obtained government documents].

d) Operations against any government group or persons.

e) All operations that contain illegal activities.

f) Evidence of incriminating activities.

g) Names and details of confidential financial accts.

2. Where is Red Box data kept?

a) Out of date material or finished cycles that can be shredded should be.

b) Large amounts of red box data that is not needed for day to day function but cannot be destroyed is located with all our NON FOI docs—and can be called for via CIC.

c) Small amounts of data that must be kept on hand due to security and frequent use—is to be kept in a briefcase locked up—and is to be marked. (in BI office area)

3. How is Red Box data, kept on the BI premises, cared for?

a) This data will be picked up and carried out of the building by 'owner' immediately upon notification of a raid, search warrant etc.

b) Persons carrying this data (as few as possible) will leave the premises and only return when they have called in and received an "all clear". (Details of who goes where with what data will be sorted out later—and drilled)

This sheet contained the handwritten comment: "NOT FOR COPYING! ! This sheet is to be returned to Sec of RBI US Dyn Mar 28 1977."

"NON-FOI docs [documents]" refers to government documents that were "obtained by covert action," J.A. at 186, *i.e.*, *not* by suits under the Freedom of Information (FOI) Act.

[8] L. Ron Hubbard, who was not indicted, and his wife, the defendant Mary Sue Hubbard, are respectively the highest and second highest officials in the Scientology organization.

of the Red Box program also illustrates the difficulty the government faced in obtaining documentary and other proof of the knowledge and intent of the defendants in carrying out their various criminal programs against various agencies of the government.

The principal contentions raised by appellants are: (1) that the government breached its plea agreement with Wolfe when it prosecuted him for conspiracy; (2) that the search of the offices of Scientology in California violated the fourth amendment; (3) that the trial judge should have recused himself on appellants' motion; (4) that the trial court erred in denying appellants' motion to disqualify all attorneys in the office of the United States Attorney from prosecuting the case; (5) that the government violated its agreement not to allocute at Hubbard's sentencings; and (6) that Hubbard's first and sixth amendment rights were violated by the refusal of the government and the court to grant "use" immunity to co-defendant Kember so that she could offer allegedly "exculpatory" testimony on Hubbard's behalf.

For the reasons set forth in detail in Parts I-VI *infra*, we reject each of these contentions and affirm the district court judgment. Because resolution of the issue involving Wolfe requires recitation of many of the facts that underlie this case, we address it first. Other facts will be set out as they become relevant to the other issues, which will be addressed in Parts II-VI.

I. Wolfe's Claim That His Prosecution Was Barred

The appellant Wolfe contends that his prosecution for conspiracy, 18 U.S.C. § 371 (1976) is barred by his agreement to plead and his plea of guilty to misuse of a government seal, 18 U.S.C. § 1017 (1976). We disagree.

Resolution of the issue raised by Wolfe requires a statement of the facts and circumstances leading up to

and surrounding his agreement to plead guilty, together with a summary of the events that followed. The narrative begins on the night of May 21, 1976 when the night librarian for the District of Columbia Bar Association library in the United States Courthouse saw two men come to the library and thereafter use the photocopy machine in the United States Attorney's Office. The same two men returned on the night of May 28. The librarian's suspicions being aroused, he alerted the United States Attorney's office which in turn informed the Federal Bureau of Investigation. A check of the sign-in logs of the courthouse and the library by FBI agents revealed that on May 21 the men had used the names of "J. Wolfe" and "J. Foster", and on May 28 the names of "Hoake" and "J. Foster". The FBI agents told the librarian to call the FBI if the men appeared again.

On June 11, 1976 the men did return to the library and the FBI was called. Two FBI agents confronted the men in the library and asked them for identification. Each produced what appeared to be an official Internal Revenue Service identification card bearing his photograph. One man showed the agents a card in the name of Thomas Blake and the other man exhibited a card in the name of John M. Foster. On checking with the IRS the agents determined that there was an IRS employee named Thomas Blake. Accordingly "Blake's" card was returned to him after the number on the card was noted. When "Foster" said he was no longer an IRS employee his identification card was confiscated. Both men were then permitted to leave the courthouse.

Three days later the FBI discovered that the man who had produced the Blake identification card was not the Thomas Blake employed at IRS. Moreover, the number which had appeared on the Blake card was assigned to another IRS employee.

On June 30, 1976 one of the FBI agents encountered "Blake" by chance in the hallway of the IRS National Office Building. The agent again asked him for identification. When he produced an IRS identification card in his true name, Gerald Bennett Wolfe, he was placed under arrest. The "Thomas Blake" identification card was not recovered. By complaint filed the same day Wolfe was charged with having used and possessed on June 11, 1976 a falsely made, forged and altered official pass and permit in violation of 18 U.S.C. § 499 (1976). He waived the forty-five day limit for the filing of an indictment or information.

Continuing investigation by the FBI disclosed the following information:

1. The "Foster" identification card had probably been made on the equipment located in the identification room of the IRS which was supposedly subject to tight security;

2. For several weeks before the end of June 1976 "Foster" had used the card approximately three times a week to enter the IRS building;

3. According to the sign-in log "Thomas Blake" had entered the IRS building on a Saturday in late April or early May 1976. No description of this man was obtained;

4. The man who used the "Foster" card was Michael J. Meisner. Meisner had never been an employee of the IRS but since 1973 had been a member and employee of Scientology in Washington, D.C. He disappeared from Washington shortly after the courthouse encounter. A warrant for his arrest was issued August 5, 1976, but he was not apprehended. As we shall see, he remained a fugitive until June 19, 1977, when he voluntarily surrendered.

In addition to the information developed by the FBI the United States Attorney's Office at this time became

aware of documents which had been produced by Scientology in connection with two civil actions in California. These documents suggested a Scientology plan to obtain information regarding pending lawsuits by infiltrating various IRS offices as well as the United States Attorney's Office in Los Angeles. Several such lawsuits filed by Scientology were pending in the District of Columbia and were being defended by the United States Attorney's Office. Counsel for Scientology in the California actions characterized the infiltration plan as a "misguided fantasy of someone".

On July 16, 1976 Wolfe and his attorney met with an assistant United States Attorney in the District of Columbia and Wolfe attempted to explain his nocturnal visits to the Bar Association library. He said that in a Georgetown bar he had chanced to meet a stranger who said his name was John Foster and that when Foster professed to be a law student, Wolfe asked him to teach Wolfe how to do legal research. Wolfe and Foster had gone to the Bar Association library for this purpose, and used the United States Attorney's xerox equipment only to copy material found in law books. As for the false identification cards Wolfe said he and Foster had got drunk one night and as part of a "drunken lark" had wandered into the IRS identification room and made false identification cards for themselves. He knew nothing more about Foster, did not know where he lived or where he was, his only association with Foster having been meetings in bars and the legal research project. As might have been expected the Assistant United States Attorney did not believe this story and he told Wolfe so.

After the meeting in the United States Attorney's Office there were plea negotiations between that office and Wolfe and his attorney. The government offered to permit Wolfe to plead guilty to a misdemeanor if he in turn would cooperate with the United States Attorney

and the grand jury by giving truthful testimony about what he and Foster were doing in the courthouse and the United States Attorney's Office, and by revealing the identity of the person or persons who had told him to make the entry. The United States Attorney was of course interested in apprehending the second man who had been with Wolfe. Until approximately April 1977 it appeared that Wolfe intended to accept the offer of a misdemeanor plea. However, at that time Wolfe suddenly informed the government, through his attorney, that he would not accept the plea offer and that he was retaining new counsel. He did retain new counsel and agreed to enter a plea of guilty to misuse of a government seal, 18 U.S.C. § 1017 (1976), a felony.

Wolfe entered his plea of guilty before District Judge Flannery on May 13, 1977. The terms of the plea agreement were disclosed on the record by the Assistant United States Attorney, Mr. Stark, and confirmed by Wolfe's newly retained attorney as follows:

> MR. STARK: Your Honor, this case is before Your Honor for a disposition pursuant to the information filed yesterday afternoon with the court charging a felony one count of fraudulent use of a government seal. The defendant in this case, Gerald Bennett Wolf [sic], has agreed to enter a plea of guilty to this charge; in exchange therefor, the government has agreed not to charge Mr. Wolf [sic] with any other possible violations arising out of three separate entries into this courthouse with another man in May and June of last year using a false and fraudulently obtained Internal Revenue I.D. card.
>
> In addition, the government will not oppose Mr. Wolf's [sic] remaining on personal recognizance pending sentence, and the government expressly reserves its right to allocute at the time of sentence. I believe Mr. Schmidt, that is an accurate statement of the plea agreement.
>
> MR. SCHMIDT: I agree that that is an accurate statement of our agreement. . . .

(J.A. 73, 74) Following these statements the court addressed Wolfe as follows:

> THE COURT: Now, it has been indicated that in return for your plea to this Information, the government will not charge you with any other possible offenses arising out of the three incidents occurring in May or June of 1976 growing out of the use of this fraudulent identification. The government will not oppose your remaining on bond pending the sentence. The government, however, reserves the right to speak against you or to allocute at the time of your sentence.
>
> Now, are those the only promises that have been made to you in this case?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Has anyone threatened you to cause you to plead guilty in this case?
>
> THE DEFENDANT: No, sir.

(J.A. 83)

Wolfe was sentenced on June 10, 1977. At the sentencing the Assistant United States Attorney summarized what was known to the government about Wolfe's activities and said that in the opinion of the government Wolfe had not told the truth to the United States Attorney and the probation office. He added:

> [T]he Government is concerned about this case primarily because of what it does not know, rather than what it does know.
>
> • • • •
>
> We are puzzled why this young man who has never been in conflict with the law before has chosen to plead to a five-year five thousand dollar felony and expose himself in that respect to the adverse collateral consequences that flow from a felony conviction rather than plead to a misdemeanor which we did offer him . . . .

(J.A. 92) On behalf of Wolfe his attorney told the court:

> What we have here is a situation in which he and another individual, very poorly advised, went into Mr. Wolfe's place of employment sufficiently filled by alcohol, and decided to play around with the identification machines.
>
> * * * *
>
> The Government has no knowledge that any classified information was revealed during these times that he was in using the Xerox machine, as he so states, or that he had gone anywhere beyond the Xerox machines. They have no evidence that their files had been rifled in any manner.

(J.A. 89, 100) He asked the court to sentence Wolfe solely on the basis of "what information is provable and here before this court." (J.A. 100)

The court placed Wolfe on probation for two years with the condition that he contribute 100 hours of community service work, without compensation, during the period of his probation.

Immediately after he was sentenced Wolfe was subpoenaed to appear before the grand jury on the same day. Before the grand jury Wolfe was questioned at length about his entries into the courthouse and the story he had given to explain what he was doing. He repeated the Foster-legal research explanation. We shall discuss this grand jury appearance later in this opinion.

On June 20, 1977, ten days after Wolfe was sentenced, Michael Meisner, who was in California, called Assistant United States Attorney Stark by telephone, saying he wished voluntarily to return to the District of Columbia and cooperate with the government. He arrived in Washington that evening. In a series of interviews over the next two weeks he recounted in detail the criminal actions he and other members of Scientology had committed. His statement described a criminal conspiracy by Scientologists to obstruct justice, suborn perjury, steal

government property, and harbor a fugitive. What follows is a brief summary of Meisner's statement.

Meisner had been an active member of Scientology since 1970. Beginning in January 1974 he was the Assistant Guardian for Information in the District of Columbia. The Guardian's Office is charged with the protection of Scientology. The Guardians handle intelligence matters including covert operations to acquire government documents critical of Scientology, internal security within Scientology, and covert operations to discredit and remove from positions of power all persons whom Scientology considers to be its enemies. Mary Sue Hubbard and Henning Heldt are the ranking officers of the Guardians in the United States, with offices in Hollywood, California.

In early 1974 Guardian Order 1361 (GO 1361) was issued by Guardian World-Wide Jane Kember whose office was in England. This order called for an all-out attack on the Internal Revenue Service which was to include the filing of law suits, a public relations assault, and infiltration of IRS by agents of Scientology. Pursuant to that order, in the summer of 1974, it was decided to plant an agent of Scientology within the National Office of the IRS in Washington, D.C. Cindy Raymond, a member of the staff of the Deputy Guardian for Information, together with Meisner and Mitchell Herman, who was then responsible for covert operations activities, were assigned the task of recruiting such an individual. Gerald Bennett Wolfe was recruited. Wolfe came to Washington and by November 1974 had obtained a position as clerk-typist at the IRS. To demonstrate to Wolfe that IRS files could be obtained Meisner and Herman entered the IRS building, went to an office in the Exempt Organization Branch and took a file relating to Scientology out of a filing cabinet. The file was taken out of the IRS building, xeroxed and returned the next morning.

On November 1, 1974 Mitchell Herman and a Scientology technician from Los Angeles surreptitiously entered the IRS building and placed a listening device in a conference room which they knew was about to be used for a high-level IRS meeting on Scientology. They tape-recorded the meeting and later Meisner saw a transcript of the tape.

From December 1974 to March 1975 Herman directed several burglaries of the office of an attorney in the Refund Litigation Division of the Chief Counsel of IRS. In March 1975 Meisner took over from Herman the supervision of all covert Scientology agents within government offices. He supervised Wolfe's activities at IRS and on numerous occasions accompanied Wolfe into the IRS building after working hours for the purpose of breaking into offices and copying documents relating to Scientology. The documents would be xeroxed and the copies sent to the Los Angeles Guardian's Office. In his statement Meisner specified a number of such burglaries.

In July 1975, acting on instructions from Meisner, Wolfe entered the Tax Division of the Department of Justice in the Star Building in the District of Columbia. Wolfe entered the Tax Division's Offices some four times and removed documents which were copied and sent to Los Angeles.

In December 1975 a program was developed to obtain INTERPOL documents concerning Scientology, contained in files held by government agencies. To this end Meisner recruited Sharon Thomas, a Scientologist, and directed her to apply for a secretarial position within the Justice Department. She did so, and obtained a position as the personal secretary of the Department of Justice attorney who was handling the Scientology Freedom of Information suit against INTERPOL. Thomas took documents from the attorney's files as well as INTERPOL files and delivered them to Meisner. It developed however that

most of the sought-after INTERPOL documents were not at the Department of Justice but probably were in the Office of Assistant United States Attorney Dodell in the United States Courthouse. Accordingly Meisner and Wolfe directed their attention to Dodell's office.

Some time in March 1975 Meisner and Wolfe entered the IRS building after hours, using Wolfe's IRS credentials. Once inside they broke into the room in which the equipment used to make identification cards was located and made themselves false identification cards using fictitious names. These credentials were later used to enter the United States Courthouse.

During the first week of May 1976 Meisner and Wolfe entered the courthouse during working hours and went to the Bar Association library on the third floor. They waited until work hours ended and then began to wander around to locate Dodell's office. They found the office in a small hallway leading from the back of the library. They attempted to open Dodell's door with a tool they had used in the past but were unsuccessful. Two or three days later Wolfe returned to the courthouse during his lunch hour and went to the Dodell office. Both Dodell and his secretary were out but Wolfe noticed a set of keys on the secretary's desk. He took the keys, called Meisner, and they went to a locksmith and had four of the keys duplicated. They then returned to the courthouse and dropped the secretary's keys in the corridor outside Dodell's office, so the secretary would assume they had fallen out of her purse.

On the night of May 21, 1976 Meisner and Wolfe returned to the Bar Association library, signing in as J. Wolfe and J. M. Foster. Proceeding to Dodell's office through the back of the library they used one of their duplicate keys to open the door. They reviewed three drawers full of files maintained in the course of FOIA litigation instituted by Scientology. They located the INTERPOL file as well as a general file on Scientology

violations and some Scientology files containing documents obtained from the District of Columbia Police Department. Placing some ten or twelve files in their briefcases they took them to the photocopy machines in the United States Attorney's Office where for two hours they xeroxed the documents. These activities produced a 5-inch stack of papers. The men then returned the files to Dodell's office and left the courthouse. After reviewing the documents Meisner sent them along to the Scientology office in California.

On the night of May 28, 1976 Meisner and Wolfe returned to the courthouse, signing themselves in as Hoake and J. M. Foster. They went to Dodell's office, filled their briefcases with Scientology files and xeroxed them on the United States Attorney's machines. Working together on two machines they produced a stack of documents slightly larger than the one of May 21.

After reviewing the documents obtained on May 28 Meisner determined that one more visit to Dodell's office would be necessary to copy the remaining Scientology documents. He was also instructed by Mitchell Herman that he was to obtain any personal information about Dodell which he could find, the purpose being to remove Dodell from a government position because he was a threat to Scientology. To carry out this operation Meisner and Wolfe returned to the courthouse on the night of June 11, 1976. They signed in as Thomas Blake and John M. Foster, using the false credentials they had made during their IRS break in. While they were waiting in the library, before proceeding to Dodell's office, they were confronted by two FBI agents who questioned them and confiscated the Blake credentials.

Frightened by the appearance of the FBI Meisner and Wolfe on leaving the courthouse took a circuitous route on foot in order to evade any pursuer, and then took a

taxi to a tavern in Georgetown. There Meisner telephoned to Mitchell Herman at the Guardian's Office in Los Angeles and informed him in cryptic language that a major development had occurred. Herman told him to call back to a telephone located outside the Scientology offices. Meisner did so and then told Herman what had occurred. Later that night Herman instructed him to come to Los Angeles the next morning. Without going home Meisner then checked into a motel where he spent the night before leaving for Los Angeles on an 8:30 A.M. flight.

On his arrival in Los Angeles Meisner gave his superiors a full written report of the courthouse incident and met with them to determine how to deal with the situation. Two proposals were considered. One was to send Wolfe to the District of Columbia with a prepared cover-up story as to why he was in the courthouse, in order to see what the authorities would do. Meisner would be sent to Washington after Wolfe's case was finished, and would also be instructed on what to say. Neither would admit any association with Scientology. The second plan was to send both Meisner and Wolfe to Washington at the same time and let them take whatever punishment was meted out, again always denying any association with Scientology. It was decided to summon Wolfe to Los Angeles immediately and Meisner was told to stay at a motel in Hollywood.

The next day, June 13, after further discussion, it was decided to send Wolfe back to Washington with a cover-up story, and later to send Meisner. Once the proceedings against Wolfe were completed Meisner would be sent to the District of Columbia with a parallel cover-up story. It was decided that Meisner would change his physical appearance and go into hiding.

On Monday, June 14, Meisner shaved his mustache and a Scientology employee visited him at the motel and cut

and dyed his hair. He was also given money to buy contact lenses to replace his eyeglasses. He purchased the lenses.

On the afternoon of June 14 Wolfe, accompanied by two Scientology officers, arrived at Meisner's motel room and the cover stories were developed. Wolfe was drilled on the specifics of the story to make sure he could stick by it. The story was the one he afterwards told the United States Attorney and the grand jury about his meeting with Foster and his legal research project. Meisner was to tell a story that corroborated Wolfe's.

In furtherance of the scheme agreed upon in Los Angeles Wolfe was returned to the District of Columbia where he was arrested June 30, 1976. Meisner remained in California. On June 14, 1976 Meisner was named National Secretary of Scientology, with an office in the Guardian's Office in Los Angeles. When it was learned that a warrant had been issued for his arrest in the District of Columbia he was removed from any official position with Scientology, but he continued to function in an unofficial capacity. He remained in hiding. This situation continued until some time in April 1977 when Meisner indicated he was tired of waiting for the case to be resolved and wished to be sent back to the District of Columbia as soon as possible. When he threatened to take the situation in his own hands he was placed under 24-hour guard, and on one occasion was removed from one building to another, handcuffed and gagged. On another occasion he was apprehended by Scientologists in Las Vegas and returned in their custody to Los Angeles where he was again placed under house arrest. Finally, on June 20, 1977 he telephoned to the United States Attorney's Office in the District of Columbia that he wished to surrender.

On July 8, 1977 the offices of Scientology in California were searched by FBI agents, pursuant to a warrant

issued on the basis of Meisner's statements to the government. Numerous documents were seized. This search and seizure are discussed elsewhere in this opinion. The seized documents confirmed the statements to the government previously made by Meisner.

On August 15, 1978 Wolfe and the other defendants were indicted by a grand jury in the United States District Court for the District of Columbia. The indictment was in twenty-eight counts. Wolfe stipulated that the District Court might find him guilty on Count Twenty-three upon the basis of a "Stipulation of Evidence", and the court did find him guilty on that count. The Stipulation also confirmed Meisner's statements. So far as Wolfe is concerned, therefore, we are concerned only with Count Twenty-three.

Count Twenty-three alleges a conspiracy to obstruct justice in violation of 18 U.S.C. § 1503 (1976), to obstruct a criminal investigation in violation of 18 U.S.C. § 1510 (1976), to harbor and conceal a fugitive in violation of 18 U.S.C. § 1071 (1976); and to make false declarations in violation of Title 18 U.S.C. § 1623 (1976). The conspiracy is alleged to have begun on or about June 11, 1976 the day Wolfe and Meisner were confronted by FBI agents in the Bar Association library. As preliminary and explanatory matter Count Twenty-three alleges (paragraph 1) that between May 21 and June 11, 1976 Wolfe and Meisner on three occasions, using forged IRS credentials, entered the courthouse for the purpose of burglarizing and stealing documents from the office of an Assistant United States Attorney; and that on June 11, during the third of these entries, they were confronted and questioned by FBI agents (paragraph 2). It is further alleged that beginning on June 11 the United States Attorney, the FBI and the grand jury were investigating the entries into the office of the United States Attorney by Wolfe and Meisner (paragraph 3), that on June 30,

1976 Wolfe was arrested and on August 5, 1976 a warrant was issued for Meisner's arrest (paragraphs 4, 5). Continuing, the count alleges that on May 13, 1977 in Criminal Case 77-283, Wolfe pled guilty to the wrongful use of a government seal in violation of 18 U.S.C. § 1017 (1976), and that on June 10, 1977 he was sentenced and that same day testified before the grand jury (paragraphs 6, 7).

The object and means of the conspiracy are alleged as follows:

> 9. It was an object of said conspiracy to corruptly influence, obstruct and impede, and corruptly endeavor to influence, obstruct and impede, the due administration of justice in connection with the investigation referred to in paragraph three (3) above, and in connection with the case of *United States v. Gerald Bennett Wolfe*, Criminal Case No. 77-283, referred to in paragraphs six and seven (6 and 7) above, for the purpose of concealing and causing to be concealed the identities of the persons who were responsible for, participated in, and had knowledge of (a) the activities which were the subject of the above-mentioned investigation and judicial proceedings, and (b) other illegal and improper activities.
>
> 10. It was further an object of said conspiracy, for the purposes stated in paragraph nine (9) above, willfully to endeavor by means of misrepresentation, intimidation, and force and threats thereof to obstruct, delay, and prevent the communication of information relating to a violation of a criminal statute of the United States by a person to a criminal investigator.
>
> 11. It was further an object of said conspiracy, for the purposes stated in paragraph nine (9) above, that the defendants and unindicted co-conspirators, having received notice and acquired knowledge of the fact that an arrest warrant for Michael J. Meisner

had been issued under provisions of a law of the United States, would and did harbor and conceal him, so as to prevent his discovery and arrest.

12. It was further an object of said conspiracy, for the purposes stated in paragraph nine (9) above, the defendants and unindicted co-conspirators, knowingly made and caused to be made false material declarations under oath in proceedings before a Grand Jury of the United States.

13. Among the means by which the defendants and the unindicted co-conspirators would and did carry out the aforesaid objects of the conspiracy were the following:

(a) The defendants and the unindicted co-conspirators would and did plan, solicit, assist and facilitate the giving of false, deceptive, evasive and misleading statements and testimony;

(b) The defendants and the unindicted co-conspirators would and did give false, misleading, evasive and deceptive statements and testimony;

(c) The defendants and the unindicted co-conspirators, in order to limit the investigation by exposing only GERALD BENNETT WOLFE and Michael J. Meisner to criminal prosecution and in order to prevent the uncovering of the true facts regarding the scope of their illegal activities, would and did plan, solicit, order, assist, encourage and facilitate the entry of a plea of guilty by Wolfe;

(d) The defendants and the unindicted co-conspirators, in an effort to harbor and conceal unindicted co-conspirator Michael J. Meisner, would and did plan, direct, order, and assist in his inititial concealment, and later in his forcible removal to secure hiding places where he was kept under guard.

Indictment, pp. 23, 24, 25 (J.A. 368-70).

Count Twenty-three alleges that forty-five overt acts were committed by the defendants in furtherance of the conspiracy. Only No. Forty-two charges an overt act by Wolfe

> (42) On or about June 10, 1977, within the District of Columbmia, GERALD BENNETT WOLFE, testified falsely before a Grand Jury of the United States District Court investigating the illegal entries into the United States Courthouse. WOLFE then reported to the Guardian's Office—DC where he was fully debriefed regarding his testimony before the grand jury. A copy of that debriefing was sent to the defendants and unindicted co-conspirators in Los Angeles and elsewhere.

Indictment, pp. 32, 33 (J.A. 377-78).

When Count Twenty-three is read in the light of Meisner's 1977 statement to the government it is apparent that the conspiracy alleged is the one described in that statement. Wolfe says his prosecution for this conspiracy is barred by the government's agreement, in exchange for his plea of guilty to fraudulent use of a government seal, "not to charge [him] with any other possible violations arising out of three separate entries into this courthouse with another man in May and June of last year [1976] using a false and fraudulently obtained Internal Revenue I.D. card." (J.A. 73) We think however that a reasonable analysis of the plea bargain requires the conclusion that it has no such effect.

When the plea agreement was made and Wolfe entered his plea the government knew only that using a false I.D. card he had entered the United States Attorney's Office and used the United States Attorney's xerox machine. The government was ignorant of Wolfe's purpose and knew nothing about the scope of his criminal activities. As Wolfe's attorney told the court at the sen-

tencing, the case was only one in which Wolfe and another man under the influence of alcohol "decided to play around with the identification machines" (J.A. 89) and there was no evidence that the prosecutor's files "had been rifled in any manner." (J.A. 100) We assume that counsel spoke in good faith, but Wolfe knew that his statement misrepresented the facts. The prosecutor agreed with counsel's statement, and said that the government was "concerned about this case primarily because of what it [did] not know". (J.A. 92) The government did not know that on the day after he entered his plea Wolfe would tell a false story to the grand jury. Nor did the government know anything about the broad conspiracy in which Wolfe played a part, to obstruct justice and harbor and conceal the fugitive Meisner as alleged in Count Twenty-three. Yet Wolfe contends that the conspiracy is an offense within the contemplation of the plea agreement as an offense "arising out of" his courthouse entries. His contention offends common sense. It is too plain for argument that the conspiracy was not an offense contemplated by the plea agreement because the existence of the conspiracy, and all its details, although known to Wolfe, were deliberately concealed by Wolfe when his plea was accepted. If Wolfe's theory is sound then he could not be prosecuted for his perjury before the grand jury; indeed he could not have been prosecuted for murder had the conspirators done away with Meisner in order to silence him. An interpretation of the agreement that would lead to such results is unreasonable.

Wolfe relies heavily on *United States v. Phillips Petroleum Co.*, 435 F. Supp. 622 (N.D. Okla. 1977), but this case does not help him. Phillips pled guilty to making an illegal campaign contribution, a misdemeanor, in violation of 18 U.S.C. § 610 (1976). Thereafter in Count I of an indictment the company was charged with conspiracy to defraud the government in violation of 18

U.S.C. § 371 (1976). There was no formal plea agreement but after taking extensive testimony the District Court found as a fact that it was understood that in return for the plea of guilty of the misdemeanor in violation of 18 U.S.C. § 610 (1976) there would be no further prosecution for any violation of 18 U.S.C., although there might be additional charges under the Tax Code, 26 U.S.C. It is true that in a pleading Phillips alleged that "the Special Prosecutor agreed that there would be no further prosecutions for any Title 18 violations arising from the *contributions*. . . ." [Emphasis added] *Id.* at 624. However, the ground of the court's decision was not that the violation alleged in Count I arose out of the contributions; rather the court held that *any* charge of a Title 18 violation was barred. Furthermore, contrary to Wolfe's statement that his "situation is directly analogous to Phillips Petroleum" (Br. p. 39) the court emphasized that the conduct alleged in Count I was disclosed to the Special Prosecutor before the plea was entered. The court held, *id.* at 636, 637, "because the conduct alleged in Count I was disclosed to the Special Prosecutor before the plea was entered, the prosecution for the conduct alleged in Count I of this indictment and charged under Title 18 of the United States Code, is barred by the terms of the plea agreement."

Wolfe says the District Court should have conducted an evidentiary hearing to determine the terms of the plea agreement and whether it barred Wolfe's prosecution. In support of this contention he cites cases in which the terms of a plea agreement were not reduced to a formal statement, but depended upon conversations and understandings between defense and prosecution. *See United States v. Phillips Petroleum Co., supra; United States v. Minnesota Mining & Manufacturing Co.*, 551 F.2d 1106 (8th Cir. 1977); *United States v. Carter*, 454 F.2d 426 (4th Cir. 1972), *cert. denied*, 417 U.S. 933 (1974). Such cases have no application here where the

plea agreement was formally stated in open court and confirmed by the defendant's attorney and the court. The only question is whether the plain terms of the agreement barred Wolfe's prosecution, and we hold they did not. Although Wolfe argues that he was entitled to testify as to his "subjective belief" concerning the scope of the agreement, this argument must be rejected. The scope of the bargain did not depend upon Wolfe's belief. *United States v. Thomas*, 593 F.2d 615 (5th Cir. 1979), *cert. denied*, 101 S.Ct. 120 (1980). The court said in that case, *id.* at 623,

> [I]n determining the scope of a plea bargain, we cannot use a subjective standard . . . The test, as applied to this particular issue, is whether "the evidence viewed objectively would lead one in the position of the defendants to reasonably conclude that the [nolo] pleas would be fully dispositive of all federal criminal matters." *United States v. Minnesota Mining & Manufacturing Co.*, 551 F.2d 1106 (8th Cir. 1977). Although we do not doubt that appellants would have liked for the plea agreement to dispose of all criminal matters then under investigation, we cannot conclude that such an expectation was reasonable viewing the evidence objectively.

WOLFE'S GRAND JURY APPEARANCE

As we have said Wolfe was subpoenaed to appear before the grand jury immediately after he was sentenced. He did appear, accompanied by his attorney, who waited outside while Wolfe testified. During the questioning of Wolfe four recesses were taken, including one for the specific purpose of allowing Wolfe to consult with his attorney. With one unconsequential exception[9] all the

[9] Wolfe was questioned briefly as to whether he had ever entered the IRS building after hours by using the "Thomas Blake" identification. He responded that he did not think he had done so. (J.A. 307-08)

questions put to Wolfe during his grand jury appearance related to the details of the three courthouse entries, the reasons for those entries and the entry into IRS to obtain the false credentials, Wolfe's association with and knowledge of "Foster", and an exploration of the evasive and contradictory answers Wolfe gave in response to the questions. It became apparent that Wolfe's testimony and explanations were untruthful.

Wolfe complains that his testimony before the grand jury was "compelled" and was thereafter used against him. He says he was not given a *Miranda* warning but was told that he had no right to claim the protection of the fifth amendment. In addition he contends that during his appearance he was harassed by the prosecutor who ridiculed his testimony and made improper comments about it. We are not impressed by the complaints.

It is established law that because a witness has been found guilty of the actions in question he is no longer entitled to claim the privilege of the fifth amendment with respect to those matters and he may be compelled to testify about them. *United States v. Skolek*, 474 F.2d 582 (10th Cir. 1973); *United States v. Hoffman*, 385 F.2d 501 (7th Cir. 1967), *cert. denied*, 390 U.S. 1031 (1968); *United States v. Gernie*, 252 F.2d 664 (2d Cir.), *cert. denied*, 356 U.S. 968 (1958); *United States v. Romero*, 249 F.2d 371 (2d Cir. 1957). Thus, by virtue of his plea of guilty and the plea agreement Wolfe had no fifth amendment privilege with respect to his entries into the courthouse, and the prosecutor was entirely correct in telling him so. Since the prosecutor's questioning related to those matters it would have been inappropriate to preface the questioning by a *Miranda* warning. In any event Wolfe's counsel accompanied him to the grand jury room, was present outside throughout the hearing, and was consulted by Wolfe at least once during the questioning. In these circumstances Wolfe's complaint

that he failed to receive a *Miranda* warning has a hollow ring.

The fallacy of Wolfe's contention that his grand jury testimony was "compelled" becomes apparent when we recall that his testimony was in substance the same "cover-up" story he had given to the prosecutor a year before. As part of the conspiracy he had agreed to tell that story, and he told it as his voluntary contribution to the conspiracy. Any "compulsion" was applied, not by the government, but by Wolfe's agreement to perjure himself in furtherance of the conspiracy.

Wolfe contends that the indictment should be dismissed because of the prosecutor's misconduct before the grand jury, and because the prosecutor misinformed Wolfe's attorney as to the scope of the grand jury questioning. With respect to these complaints it is enough to say that we have reviewed the record, including the transcript of Wolfe's grand jury testimony, and we can find no fault with the prosecutor's conduct. It is true that the questioning of Wolfe was sharp and persistent, but a prosecutor is under no obligation to soothe a witness who is obviously evasive and untruthful.

II. The Search-Seizure Issues

The search and seizure operation with which we are concerned in this appeal involved over 200 FBI agents and government personnel [10] who spent over 20 hours examining the files and papers maintained in two California offices of Scientology. Pursuant to a warrant which specified 162 separate descriptions of seizable documents relating to several offenses, the agents entered a number of rooms in two large buildings, and searched

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[10] *See* Tr. 8/27 at 188-90 (Agent Varley). The district court estimated that "over 150 FBI agents" were involved in the search. United States v. Hubbard, 493 F. Supp. 209, 234 (D.D.C. 1979).

numerous file drawers, desk drawers and tops, boxes and closets. Appellants contend that the searches and seizures violated the fourth amendment.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

However, the magnitude of the search is not enough by itself to establish a constitutional violation. Instead, "[o]ur fundamental inquiry in considering Fourth Amendment issues is whether or not [the] search or seizure is reasonable under all the circumstances." *United States v. Chadwick*, 433 U.S. 1, 9 (1977).[11] In this case, "all the circumstances" include not only the scope of the warrant and the behavior of the searching agents, but also the conditions under which they had to conduct the search, and the particular nature of the evidence being sought in relation to the underlying offenses. This court has recognized that although the crimes of conspiracy and obstruction of justice may present law enforcement officers with difficult evidence-gathering problems, such difficulties do not prevent the use of comprehensive search

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[11] *See also* Michigan v. Summers, —— U.S. ——, 101 S. Ct. 2587, 2592-93 & n.12 (" 'key principle of the Fourth Amendment is reasonableness—the balancing of competing interests' " *quoting* Dunaway v. New York, 442 U.S. 200, 219 (1979)); Roaden v. Kentucky, 413 U.S. 496, 501-02 (1973); Chimel v. California, 395 U.S. 752, 765 (1969); Terry v. Ohio, 392 U.S. 1, 19 (1968); Cooper v. California, 386 U.S. 58, 59 (1967); United States v. Rabinowitz, 339 U.S. 56, 63, 66 (1950) ("whether the search was reasonable . . . depends upon the facts and circumstances—the total atmosphere of the case").

warrants designed to obtain all relevant documentary evidence.

> [C]onspiratorial crimes are conducted with more secrecy than many other crimes, and search warrants that seek evidence of conspiracy, and otherwise meet the required standards, may extend to all relevant evidence of that crime. Otherwise, alleged conspirators would occupy a special protection from prosecution that is not available to other accused persons. The same may be said of search warrants seeking relevant evidence of obstruction of justice. Neither of these offenses possess any special immunity which would protect them from being ferreted out by proper search warrants seeking relevant evidence. While these offenses may have certain subjective elements, . . . the evidence that proves such subjective elements may be objective, tangible and constitute clear proof.

In Re Search Warrant Dated July 4, 1977, 572 F.2d 321, 328 n.4 (D.C. Cir. 1977), *rehearing en banc denied*, 572 F.2d 328 (D.C. Cir.), *cert. denied*, 435 U.S. 925 (1978). *See Also Andresen v. Maryland*, 427 U.S. 463, 481 n.10 (1976).

After careful consideration of defendants' claims against the warrant and its inherently difficult execution, we conclude that the warrant was valid and that its execution satisfied the ultimate constitutional requirement of reasonableness. *See* sections B and C, *infra*.

A. *Factual Summary*

Although the facts relevant to each legal issue are discussed in context, a brief overview of the search and seizure operation is appropriate here.

On July 8, 1977, three search warrants were simultaneously executed for premises owned and operated by the Church of Scientology: one for Washington, D.C., the

other two for the Fifield Manor [12] and the Cedars-Sinai Complex [13] in Hollywood, California. Since the evidence introduced at defendants' trial was obtained from the Hollywood searches, not from the Washington search,[14] this opinion is concerned only with the validity of the former. The search warrants were based upon a 33-page sworn affidavit [15] which set forth the results of the government's investigation into charges that various officials of Scientology, including defendants, had conspired to steal—and had stolen—documents belonging to the federal government, and further had conspired to obstruct justice by covering up these crimes during a grand jury

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[12] Fifield Manor is located at 5930 West Franklin Ave., Hollywood, California.

[13] The Cedars-Siani Complex is located at 4833 Fountain Avenue, Hollywood, California.

[14] The Washington search spawned its own line of litigation. On July 27, 1977, Chief Judge Bryant held that the warrant executed at Scientology's facility in the District of Columbia was invalid on its face, and granted Scientology's motion for return of the seized documents pursuant to Fed. R. Crim. P. 41(e). *In Re Search Warrant Dated July 4, 1977*, 436 F. Supp. 689 (D.D.C. 1977). This court reversed Judge Bryant's decision and upheld the validity of the District of Columbia warrant. *In Re Search Warrant Dated July 4, 1977*, *supra*, 572 F.2d 321. Upon remand from this court, Judge Bryant then found that "the agents . . . illegally and unconstitutionally executed this warrant and converted their seizure of documents into a general exploratory seizure in violation of the Fourth Amendment . . . ." *In Re Search Warrant Dated July 4, 1977*, No. 77-0151, Memorandum and Order at 10a (D.D.C. Aug. 27, 1979). The decision of the appeal to this court from that ruling is issued simultaneously with this opinion. *In Re Search Warrant Dated July 4, 1977*, Nos. 79-2138, 79-2176 (D.C. Cir. ——).

[15] J.A. at 165. The affidavit was signed by FBI Special Agent Robert Tittle, and was based largely upon information obtained from Michael Meisner, a former "Assistant Guardian for Information" and "National Secretary" in the Scientology hierarchy. *Id.* at 168; p. 21 *supra*.

investigation of a burglary of the office of an Assistant United States Attorney in the United States Courthouse in Washington, D.C.

On July 7, 1977, the day before the searches took place, various supervisory and legal personnel from the FBI's Los Angeles office, and others from the U.S. Attorney's office in Washington, conducted a briefing for the agents who had been selected to participate in the searches of Fifield Manor and the Cedars-Sinai Complex. At six a.m. on July 8, teams of agents entered both Fifield Manor and Cedars-Sinai to execute the search. The Fifield Manor search—the smaller of the two—covered a four-room area around defendant Henning Heldt's office on the sixth floor, his personal office, a large secretary's office, the office of his assistant (defendant Snider), and an adjoining but separated "penthouse" room. Within this area the agents searched approximately eight four-drawer file cabinets, one two-drawer file cabinet, five desks, three closets, and various piles of documents and papers. They also searched, but seized nothing from, an adjoining telex room. All told, the agents seized approximately 430 documents from Fifield Manor.[16]

The Cedars-Sinai search was far more extensive. Although over 50 agents were initially assigned to this search operation,[17] by mid-morning the supervising

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[16] *See* Fifield Inventory, Def. Exh. 421, 421a.

[17] *See* Tr. 8/23 at 50. Over 100 agents and other personnel are listed in the Joint Appendix as having been assigned to the Cedars-Sinai search, but it is unclear whether this count includes the 50 late-arriving agents. *See* Def. Exh. 575, List of Agents Assigned to Search, J.A. at 1314-15. Agent Varley stated that during the course of the Cedars-Sinai search approximately 180 FBI personnel were "on the scene," and that from one or two o'clock in the afternoon continuously until two a.m. the next morning between 110 and 130 FBI people were actually engaged in searching. Tr. 8/27 at 188-90.

agents decided that the number of agents on hand was insufficient.[18] Accordingly, approximately 50 additional agents—who had not been briefed the day before—were added to the search teams.[19] Agents remained on the site searching well into the night, in over thirty rooms, and examined hundreds of filing cabinets, boxes, desks, wall cabinets, and assorted loose documents. In all, between 23,000 and 47,000[20] separate documents were seized from Cedars.

Immediately following the execution of the warrants, the Church filed two separate actions in Los Angeles and in the District of Columbia seeking return of the seized property pursuant to Fed. R. Crim. P. 41(e).[21] Neither action effected a return of all the documents.[22] On August 15, 1978, defendants were indicted by a federal grand jury in the District of Columbia. Defendants urged the district court below to suppress all evidence seized in the California operations. After holding hearings in both Los Angeles and in Washington, and viewing personally the searched premises in Hollywood, the district court held the California searches and seizures to be reasonable and refused to suppress any of the fruits thereof.

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[18] *See* Tr. 8/24 at 10; Tr. 8/27 at 17. United States v. Hubbard, *supra*, 493 F. Supp. at 230.

[19] *See* Govt. Br. at 51; App. Br. I at 11; Tr. 8/24, at 35, 36, 38.

[20] *Compare* Govt. Br. at 25 *with* App. Br. I at 30.

[21] *See* Church of Scientology v. United States, No. CV-77-2565-MML (C.D. Cal. Apr. 4, 1978, and July 5, 1978), *reprinted at* J.A. 201-229, 230-258 (California decisions); note 14 *supra* (District of Columbia decisions).

[22] The government has returned voluntarily approximately 40% of the documents it seized. *See* United States v. Hubbard, *supra*, 493 F. Supp. at 234; Govt. Br. at 103 n.131a.

B. *Fourth Amendment Interests Implicated in This Case*

The fourth amendment serves to protect two distinct interests. *See generally Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971) (plurality opinion of Stewart, J.). First, the warrant requirement seeks to guarantee that any searches intruding upon an individual's privacy must be justified by probable cause, as determined by a "neutral and detached magistrate."[23] Second, where probable cause is found and a warrant issues, the particularity requirement seeks to assure that

> those searches deemed necessary should be as limited as possible. Here, the specific evil is the "general warrant" abhorred by the colonists, and the problem is not that of intrusion *per se*, but of a general, exploratory rummaging in a person's belongings.

Id. As the Supreme Court stated decades ago,

> [t]he requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.

Marron v. United States, 275 U.S. 192, 196 (1927).

Of course, even when the search warrant meets both the probable cause and particularity requirements, the search itself must be conducted in a reasonable manner,[24]

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[23] Johnson v. United States, 333 U.S. 10, 14 (1948).

[24] The right to be free from unreasonably broad searches is distinct from those rights which concern a warrant's validity:

> "The general right of security from unreasonable search and seizure was given a sanction of its own and the amendment thus intentionally given a broader scope. That the prohibition against 'unreasonable searches' was in-

appropriately limited to the scope and intensity[25] called for by the warrant. *See Terry v. Ohio*, 392 U.S. 1, 17-18 (1968) ("This Court has held in the past that a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope."); *id.* at 28-29; *United States v. Rettig*, 589 F.2d 418, 423 (9th Cir. 1978); *United States v. Clark*, 531 F.2d 928, 931 (8th Cir. 1976). When investigators fail to limit themselves to the particulars in the warrant, *both* the particularity requirement and the probable cause requirement are drained of all significance as restraining mechanisms, and the warrant limitation becomes a practical nullity. Obedience to the particularity requirement both in drafting and executing a search warrant is therefore essential to protect against the centuries-old fear of general searches and seizures.

Defendants' first claim is that the warrants for Fifield Manor and Cedars-Sinai were overbroad. We have already dealt with that argument in our opinion in *In Re Search Warrant Dated July 4, 1977, supra*, which concerned the facial validity of the warrant to search Scien-

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tended, accordingly, to cover something other than the form of the warrant is a question no longer left to implication to be derived from the phraseology of the [Fourth] Amendment."

Payton v. New York, 445 U.S. 573, 584 n.23 (1980) (quoting N. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 103 (1937)).

[25] In this case, scope and intensity refer to the location and manner in which the search was conducted. *See* text at III 2, 3 *infra*. Regarding the term "intensity," *see generally* Harris v. United States, 331 U.S. 145, 152 (1947) ("The same meticulous investigation which would be appropriate in a search for two small canceled checks could not be considered reasonable where agents are seeking a stolen automobile or an illegal still.").

tology's offices in Washington, a warrant identical in all material respects to the ones challenged here. Each of the warrants contained 162 descriptions of property subject to seizure. Items 1-99 listed documents alleged to have been stolen and copied from the office of an Assistant United States Attorney in Washington, D.C. Items 100-148 listed documents alleged to have been stolen and copied from an attorney at the Justice Department, also in Washington. Finally, Items 149-62 [20] listed either in-

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[20] The following items appeared in the "Description of Property" attached to each of the warrants:

149. Synopsis of Gerald Wolfe's June 10, 1977 Grand Jury testimony.

150. Memorandum, notes or report prepared by Richard Weigand on or about June 12, 1976 relating to Gerald Wolfe, Michael Meisner, about a surreptitious entry into the United States Courthouse building in the District of Columbia.

151. Any notes, memoranda, or reports prepared by Michael Meisner and/or Gerald Wolfe relating to their entry into the United States Courthouse on or abount June 11, 1976 and their confrontation with two FBI agents on that date.

152. Guardian Order 1361.

153. Guardian Order 1634.

154. Any and all Guardian Orders issued pursuant to Guardian Order 1634 which would be identified as Guardian Order 1634—(number).

155. A Guardian Order generally identified as "Snow White".

156. Any and all Guardian Orders issued pursuant to the Guardian Order generally identified as "Snow White" which would be identified by the mention of "Snow White".

157. Any and all documents contained in the Operations Files concerning Robert Snyder.

[Continued]

ternal documents of Scientology, or other allegedly stolen documents. With respect to Items 149-62, Scientology in *In Re Search Warrant* contended that an agent would construe the warrant, *for all practical purposes*, as authorizing discretionary rummaging prohibited by the fourth amendment. *See generally In Re Search Warrant, supra*, 572 F.2d at 324, 327 (per curiam), 330 (statement of Robinson, McGowan, JJ, on suggestion for rehearing en banc). We held, on authority of *Andresen v. Maryland*, 427 U.S. 463 (1976), that the warrant—when read in conjunction with the affidavit—was sufficiently specific and particularized, did "not leave to the executing officers impermissible discretion," and was in all other respects valid. *In Re Search Warrant, supra*, 572 F.2d at 328. That determination controls this case.[27]

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[26] [Continued]

158. Any and all documents of the Internal Revenue Service relating to the Church of Scientology Calif. marked "Confidential, GO 1361 Material". (This would include the Hawaii and California cases.)

159. Any and all documents attached to a memorandum from Mitchell Hermann identified as "Mitch" or Michael Meisner identified as "Mike".

160. Any and all memoranda written by Michael Meisner identified as "Mike" making reference to attached government documents.

161. Any and all documents marked "Non-FOI".

162. Any and all fruits, instrumentalities, and evidence (at this time unknown) of the crimes of conspiracy, obstruction of justice and theft of government property in violation of 18 U.S. Code §§ 371, 1503 and 641 which facts recited in the accompanying affidavit make out.

J.A. at 162-63.

[27] We disagree with the statement in the concurring opinion that the "ideas" in these documents are protected by the decision in Stanford v. Texas, 379 U.S. 478, 485 (1965). The

documents here bear no relationship to the material seized in *Stanford*. Seizing the above documents in no way indicates an intent by the government to "[suppress] objectional publications," or to "[stifle] liberty of expression," when it is "books that are seized because of the ideas which they contain." Not one of the 14 items (149-62) includes any "book," or "publication" and none refers in any sense to any ideology, but only to ordinary unlawful conspiracies and substantive criminal offenses. The crimes charged here are not "ideological offenses." Those who formulate conspiracies to obstruct justice, steal government property, burglarize, bug, harbor fugitives from justice, and commit and suborn perjury before the grand jury (J.A. 108-149, 150-199) have no constitutional right under the first amendment to conceal the documentary evidence thereof. A mere reading of items 149 to 162 and the supporting affidavit makes it plain that none of them transgress the liberties protected by the first amendment. Likewise none of the documents are of a religious nature. In addition, this is not a third-party search situation as in Zurcher v. Stanford Daily, 436 U.S. 547 (1978), and freedom of religion is not endangered but encouraged when criminal conspiracies are suppressed that attempt to hide behind religion.

Defendants also allege that the warrants lacked probable cause for various particular items listed, and also that the warrants were based on stale information. The probable cause issue was briefly discussed in this court's earlier decision concerning the Washington warrant:

> These offenses [alleged in the affidavit] are not "amorphous"—they are specific, particularized and according to the affidavit supported by reams of hard documentary evidence as well as by sworn statements of some of the alleged conspirators and principals in the conspiracy and substantive offenses . . . . [W]e agree with the finding of the United States Magistrate that the affidavit did show probable cause[.]

In Re Search Warrant Dated July 4, 1977, *supra*, 572 F.2d at 326.

Defendants now focus their attack upon the probable cause basis for Items 153-56. We fully agree with the district court that the affidavit provided adequate support for the inclusion of items 153-54 in the warrant. *See* United States v. Hubbard, *supra*, 493 F. Supp. at 218; J.A. at 171-72. Regarding items

There remain, however, the issues related to the execution of the warrants.[28] Normally, criminal defendants

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155 and 156, we agree with the government that although the affidavit's description of "Snow White" as one of several "programs directed against governmental agencies" is "cryptic" and ambiguous, Govt. Br. at 74. Nevertheless, the affidavit does provide probable cause to believe that the "Snow White" program was linked to criminal activity. J.A. at 171-188.

We also find that the affidavit provided adequate basis for the conclusion that any of the documents specified in the Description of Property might have been found either at Fifield Manor or at Cedars-Siani; therefore it was appropriate for both warrants to list all 162 particulars. *See generally* United States v. Hendershot, 614 F.2d 648, 653-54 (9th Cir. 1980); United States v. Melvin, 596 F.2d 492, 495 (1st Cir.), *cert. denied*, 444 U.S. 837 (1979) (affidavit need not prove that it is "more-likely-than-not" that evidence is at the particular location to be searched, but only that it would be reasonable to search for it in that location).

Finally, we find unpersuasive defendants' argument that the affidavit was stale. A fair reading of the affidavit reveals that it was based on information confirmed within a month immediately preceding the search. *See* J.A. at 192-94. In this case, as in Andresen v. Maryland, *supra*, 427 U.S. at 478 n.9, it was "eminently reasonable" to believe that the documents sought in the warrant would be maintained in the locations indicated in the affidavit. *See generally* United States v. Hubbard, *supra*, 493 F. Supp. at 218.

[28] Both sides vigorously argue the standing of the defendants to raise the propriety of the search as an issue in this case. The government concedes, however, that all of the defendants have a "legitimate expectation of privacy" in their respective personal offices. *See* Gov't Br. at 65-72; Rakas v. Illinois, 439 U.S. 128, 143 (1978). It is essentially uncontested, therefore, that defendants may raise the issue of the scope of this search, at least insofar as it relates to their own offices which were located both at Fifield Manor (Heldt and Snider) and at Cedars-Sinai (Willardson and Raymond). The dispute over standing thus boils down to whether defendants' allegations of a *general search* can be based, *even in part*, upon evidence that agents rummaged at will in areas

seeking suppression on appeal allege that the particular evidence used against them at trial was unlawfully seized, and for that reason should not have been admitted. *Weeks v. United States*, 232 U.S. 383 (1914). Defendants here, however, make no such argument. They have made no attempt before this court to single out as unlawfully seized any of the 201 particular documents used against them at their trial.[29] Defendants argue instead

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of Scientology's facilities not necessarily used by the defendants as their personal offices.

The district court's resolution of this issue is unclear. At one point the court stated that "only the defendants Heldt, Snider, Willardson, and Raymond have fourth amendment rights touched by the searches . . . and their rights are limited to evidence seized from their offices which is being introduced against them." United States v. Hubbard, *supra*, 493 F. Supp. at 215. Yet the court also engaged in a lengthy analysis of defendants' allegations regarding a general search, allegations which rested upon the agents' conduct throughout their search of the Fifield Manor and Cedars-Sinai complexes. *Id.* at 228-34. We believe the district court properly addressed these general allegations, and in so doing properly considered the totality of the circumstances surrounding the search of the two buildings. *See generally* note 11 and accompanying text *supra*.

[29] The district court noted that "defendants have made no attempt to directly challenge the legality of the seizure of these case-in-chief documents." United States v. Hubbard, *supra*, 493 F. Supp. at 221. Defendants did, however, submit to the district court an analysis of the government's case-in-chief documents, asserting that "all the case-in-chief documents must be suppressed." *See* Defendants' Resp. to Gov't Submission Relating to Case-in-Chief Documents, J.A. at 864, 869.

Although we have not been asked to do so, we have carefully considered defendants' analysis presented to the district court on this question, and find it meritless. First, defendants virtually concede the government's assertion that the documents were within the Description of Property listed in the warrant. *See* Defendants' Motion for Return of Gov't's Indexed Case-in-Chief Documents (Sept. 4, 1979). Second,

that because the search *as a whole* was a general search, all documents therein seized must be suppressed. Defendants apparently have chosen to place all their hopes on an argument for total suppression, asserting that "[u]nless the exclusionary rule is held to require the suppression of *all* the fruits of a general search, there will be no restraint upon the conduct of such searches, and the core of the Fourth Amendment will have been eviscerated." App. Br. I at 117 (emphasis in original).

We recognize that in some cases a flagrant disregard for the limitations in a warrant might transform an otherwise valid search into a general one, thereby requiring the entire fruits of the search to be suppressed. *See generally United States v. Rettig*, 589 F.2d 418, 423 (9th Cir. 1978); *United States v. Fernandez*, 430 F. Supp. 794, 801 (N.D. Cal. 1976); *United States v. Nine 200-Barrel Tanks of Beer*, 6 F.2d 401, 402 (D.R.I. 1925).[30] *Cf. United States v. Tracy*, 350 F.2d 658 (3d Cir.), *cert. denied*, 382 U.S. 943 (1965) (all evidence suppressed for disregard of limits on use of force). If in this case law enforcement officers had conducted a document search as if no limiting warrant existed, rummaging at will among defendants' offices and files, then the mere existence of a valid—but practically irrelev-

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their own chart detailing the location of the case-in-chief documents does not show any coming from Lawrence's office or from the "Action Bureau," the only locations the agents searched that appellants seriously argue were outside the warrant. J.A. 872-77. *See* pp. 14-15 & n.18, *infra*. Finally, defendants' allegation that those case-in-chief documents seized under Items 159-61 must be suppressed for lack of particularity is contrary to our holding that the warrant is sufficiently particularized. *See* TAN 26-27 *supra*.

[30] *But see* Vonderahe v. Howland, 508 F.2d 364, 368-72 (9th Cir. 1974) (even where overbroad warrant is combined with overbroad search for documents, equitable application of exclusionary rule does not require suppression or return of all evidence seized).

ant—warrant for certain specified documents would not be determinative of whether the search was so unreasonable as to require suppression of everything seized. Defendants do show several instances where documents were seized outside the warrant, but they do not demonstrate such flagrant disregard for the terms of the warrant which might make the drastic remedy of total suppression necessary. Absent that sort of flagrant disregard, the appropriate rule seems to be that where officers seize some items outside the scope of a valid warrant, this by itself will not affect the admissibility of other contemporaneously seized items which do fall within the warrant. *See United States v. Forsythe*, 560 F.2d 1127, 1134 (3d Cir. 1977) ("Assuming *arguendo* that the seizure of the items not listed in the warrant was illegal, this does not justify suppression of highly probative evidence consisting of those documents and records which were legally seized pursuant to a valid warrant."); *United States v. Daniels*, 549 F.2d 665, 668 (9th Cir. 1977); *United States v. Artieri*, 491 F.2d 440, 445-46 (2d Cir.), *cert. denied*, 419 U.S. 878 (1974); *United States v. Mendoza*, 473 F.2d 692, 696-97 (5th Cir. 1972); *United States v. Holmes*, 452 F.2d 249, 259 (7th Cir. 1971), *cert. denied*, 405 U.S. 1016 (1972). *See generally United States v. Scott*, 516 F.2d 751, 760 n.19 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 917 (1976) (dictum noting agreement with the rule.)

In the following section, we outline the standards for judging the reasonableness of a document search, and explain why the government's actions—taken as a whole—do not amount to a flagrant disregard of those standards.

C. *The General Search Issue*

"[T]he Fourth Amendment confines an officer executing a search warrant strictly within the bounds set by the warrant[.]" *Bivens v. Six Unknown Named*

Agents, 403 U.S. 388, 394 n.7 (1971). In the context of document searches, the need to prevent "general, exploratory rummaging in a person's belongings" [31] is particularly acute. Unlike searches for other tangibles, document searches—like eavesdropping and bugging "searches" [32]—tend to involve broad disclosures of the intimacies of private lives, thoughts and transactions. The acute constitutional hazards of this sort of investigative activity have been recognized by the Supreme Court. In *Andresen v. Maryland*, 427 U.S. 463 (1976), which involved a search and seizure of a criminal defendant's office files, the Supreme Court stated:

> We recognize that there are grave dangers inherent in executing a warrant authorizing a search and seizure of a person's papers that are not necessarily present in executing a warrant to search for physical objects whose relevance is more easily ascertainable. In searches for papers, it is certain that some innocuous documents will be examined, at least cursorily, in order to determine whether they are, in fact, among those papers authorized to be seized. Similar dangers, of course, are present in executing a warrant for the "seizure" of telephone conversations. *In both kinds of searches, responsible officials, including judicial officials, must take care to assure that they are conducted in a manner that minimizes unwarranted intrusions upon privacy.*

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[31] Coolidge v. New Hampshire, *supra*, 403 U.S. at 467.

[32] The Court's directive to judicial officials in *Andresen* to enforce a minimization requirement, discussed immediately *infra*, has a parallel in eavesdropping and wiretap cases. *See, e.g.*, Katz v. United States, 389 U.S. 347, 355-56 (1967); Berger v. New York, 388 U.S. 41, 53-4, 56-7, 66-67 (1967). *See generally* Scott v. United States, 436 U.S. 128 (1978) (concerning both judicial and statutory minimization requirements).

Id. at 482 n.11 (emphasis supplied).[33]

This court implicitly recognized the importance of the *Andresen* minimization requirement in our earlier decision concerning the Washington warrant. The court held the warrant valid, but did so expressly and repeatedly on the ground that a study of the accompanying affidavit would make the search warrant sufficiently particular and specific so as to avoid the danger of a general search. *In Re Search Warrant Dated July 4, 1977, supra*, 572 F.2d at 324, 325, 326, 327. Since the permissible intensity of any search is determined by the description of the things to be seized,[34] the court's explicit references to the particulars in the affidavit indicated our intention that the execution of this document search be confined to those particulars, so that it would not become simply a grant of "'authority to the agents to search for and seize *any* evidence of conspiracies to steal government property and to obstruct justice. . . .'" *Id.* at 324 (original emphasis). The court described that latter broad construction as being "patently incorrect," and noted that "[t]he recited facts and designations of

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[33] Thus if any of the documents used by the government as evidence-in-chief against defendants had been seized without scrupulous adherance to the warrant, we might be required to reverse. But defendants make no case for suppressing these particular documents on those grounds. *see* note 29 and accompanying text *supra*. There we have stated that the issue before us is not whether any particular documents used against defendants should have been suppressed because *those documents* were seized in violation of the scrupulous exactitude test; rather the question is whether documents *lawfully seized under a valid warrant* should be suppressed because the search accompanying their seizure was too general. The scrupulous exactitude test is too rigorous a standard to use in deciding that issue.

[34] 2 W. LaFave, *Search and Seizure* § 4.10(d) (1978); *see* note 25 *supra*.

property and offenses impose particular limits upon the search warrant . . . ." *Id.* It is undoubtedly true that a shorter, more clearly delimited warrant might have made the agents' duty to properly limit their search easier to fulfill. But the question now is not whether the warrant could or should have been more narrowly confined; rather, given the broad scope of this already approved warrant, the question here is whether the searching agents properly confined themselves to its terms when conducting their search. A proper execution of a search warrant for numerous documents requires three things: adequate preparation; obedience to area limitations; and restrictions on seizure of items not mentioned particularly in the warrant. We discuss each requirement, and the degree to which it was adhered in this case, below.

1. *Adequate preparation.*

Warrants are not self-executing; they require agents to carry them out. In order for a warrant's limitations to be effective, those conducting the search must have read or been adequately apprised of its terms.[35] Where, as here, the terms are numerous, complex, and potentially overbroad unless limited by the specifications of an extensive affidavit, the need for careful preparation on the part of those searching is essential.[36] In this case

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[35] Only when the agents are *aware* of the warrant, through personal knowledge or instruction, can they properly exercise the discretion vested in them to carry out its terms. *Cf.* Dalia v. United States, 441 U.S. 238, 257 (1979) (in absence of specific instructions, execution of warrant "generally left to the discretion of the executing officers").

[36] As Judge Leventhal pointed out, "we are concerned with realities of administration of criminal justice." Moore v. United States, 461 F.2d 1236, 1238 (D.C. Cir. 1972). He went on to note that in judging whether a warrant is sufficiently particular, the court should assume that it will be "read 'with reasonable effort' by the officer executing the warrant." *Id.*

we are convinced that most of the agents conducting the search were provided with as much preparation and information as was reasonable under the circumstances to enable them to carry out the warrant's complicated terms.[37] On the other hand, some 50 agents who arrived at Cedars-Sinai during the afternoon were given neither a meaningful opportunity to read the warrant and affidavit, nor any sort of comprehensive briefing of their terms, before beginning their mission.[38] In conducting a search of this complexity and magnitude the agents should be familiar with the general nature of the crimes that are charged and the list of items they are authorized to seize, either through reading of the warrant or

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[37] The majority of the agents spent the day before the search being thoroughly briefed on the operation they were about to undertake. They were provided with copies of the affidavit and the search warrant, and questions regarding the warrant and the law of search and seizure were answered by their team leaders and by Assistant United States Attorneys. *See* United States v. Hubbard, *supra*, 493 F. Supp. at 229-30; Def. Exh. 361, J.A. at 1270; Def. Exh. 359, J.A. at 1256, 1258; Tr. 7/16, at 94, 144-45, 164-65, 171.

[38] At least one new agent admitted he had not read *any* of the 162 particulars in the warrant. Tr. 8/24, at 149. Supervising Agent Calley admitted that the briefing given to the late arriving agents lasted no longer than 15 or 20 minutes, and that they were not given copies of the warrant or affidavit to examine. Tr. 8/24, at 38-9. Surely what the FBI spent all day teaching and reviewing on the 7th of July could not be learned in only 15 minutes on the 8th. Agent Calley's simplified and imprecise explanation of the warrant's terms was an inadequate substitute for distributing copies of the warrant and affidavit to the agents for their reference. *See* Tr. 8/24, at 37-42 (Calley told the newcomers, *inter alia*, "to be alert for any documents that tended to indicate the Church was involved in the defamation of anyone's character . . . ." *id.* at 41); Tr. 8/27, at 188-90 (Agent Varley); Tr. 8/24 at 125, 129-30, 146, 154 (Agent Maryman); *id.* at 88A-89 (Agent Harmon); Tr. 8/27 at 61, 138 (Agent Dietzen); Tr. 7/16 at 287-88, 309 (Agent Oppy).

through adequate instructions or supervision from those in charge. If a supplementary document like an affidavit is essential to properly understand the limitations of the warrant, *see* text at 10-11 *supra*, then its contents must be examined, or else communicated to the agents by their supervisors.[39] Minimization designed to control the proper scope of the search cannot occur without such knowledge.

Nonetheless, though the facts here in some respects approach the limits of constitutional acceptability, we do not believe that the arrival of a supplementary contingent of inadequately prepared agents in this particular case resulted in a general search which might require the exclusion of all seized documents. Those agents who received inadequate information initially, and who were brought in only after the supervising agents on the scene determined that additional manpower was required,[40] always represented less than half the total of those searching at Cedars-Sinai.[41] The agents operated in teams and there is no evidence that the first group of agents, or the late arriving agents, were not adequately supervised. They were instructed that if they had questions regarding particular documents, they should seek out their search team leaders who would determine whether the documents fell within the scope of the warrants;[42] such consultations occurred frequently throughout the operation.[43] They were also informed that copies

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[39] *See generally* Moore v. United States, 461 F.2d 1236, 1238 (D.C. Cir. 1972); United States v. Johnson, 541 F.2d 1311, 1315-16 (8th Cir. 1976); United States v. Marti, 421 F.2d 1263, 1268-69 (2d Cir. 1970), *cert. denied*, 404 U.S. 947 (1971).

[40] *See* Tr. 8/24, at 10.

[41] *See* note 17 and accompanying text, *supra*.

[42] *See* Tr. 8/24, at 43-44, 147; Tr. 8/27, at 317.

[43] *See* Tr. 7/16, at 272; Tr. 7/17, at 443; Tr. 8/24, at 177; 8/27, at 140.

of the warrant and affidavit would be available for their use within the search area.[44] Even more important, the late-arriving agents worked alongside and in conjunction with others[45]—both supervisors and searchers—who had been satisfactorily briefed, who had reviewed the warrant and affidavit and had them in their possession,[46] and who assisted the newcomers in their choice of documents to be seized.[47] As a final measure, the leaders of the search reviewed many of the documents initially seized by the new agents in order to compare them to the warrant's particulars, before listing them in the inventory of items to be seized.[48] Thus, on the whole, we conclude that the inadequate initial preparation of some agents, though disturbing, did not so taint this search as to convert it into a general rummage for evidence, and we therefore decline to order complete suppression on this basis.

2. *Area limitation.*

A second limitation upon searches concerns the area to be covered by the search operation itself. It it well accepted that the authority to search granted by any warrant is limited to the specific places described in it, and does not extend to additional or different places. *See, e.g., Keiningham v. United States*, 287 F.2d 126, 129 (D.C. Cir. 1960); *United States v. Principe*, 499 F.2d 1135, 1137 (1st Cir. 1974); 2 W. LAFAVE, SEARCH AND SEIZURE § 4.10 (1978). In this case the only serious

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[44] *See* Tr. 8/22, at 55; 8/24, at 41-44.

[45] *See* Tr. 7/16, at 309.

[46] *See* Tr. 8/22, at 55; Tr. 8/24, at 151-52; Tr. 8/27, at 318.

[47] *See* Tr. 8/24, at 177.

[48] *See* Tr. 7/16, at 310; Tr. 8/27, at 316-17.

allegation of geographic overbreadth [49] is raised by defendant Mary Sue Hubbard, and concerns Mrs. Janet Lawrence's office in Fifield Manor.

The Fifield Manor warrant authorized a search of "the suite of offices of Mr. Henning Heldt[.]" The warrant also stated that "[t]he office of Mr. Henning Heldt . . . is located on the sixth floor, the last office on the left-hand side of the corridor to the right of the elevator." J.A. at 155. No one else's office was authorized to be searched at Fifield Manor. Mrs. Lawrence's office, a free-standing penthouse room, or hut, built out on top

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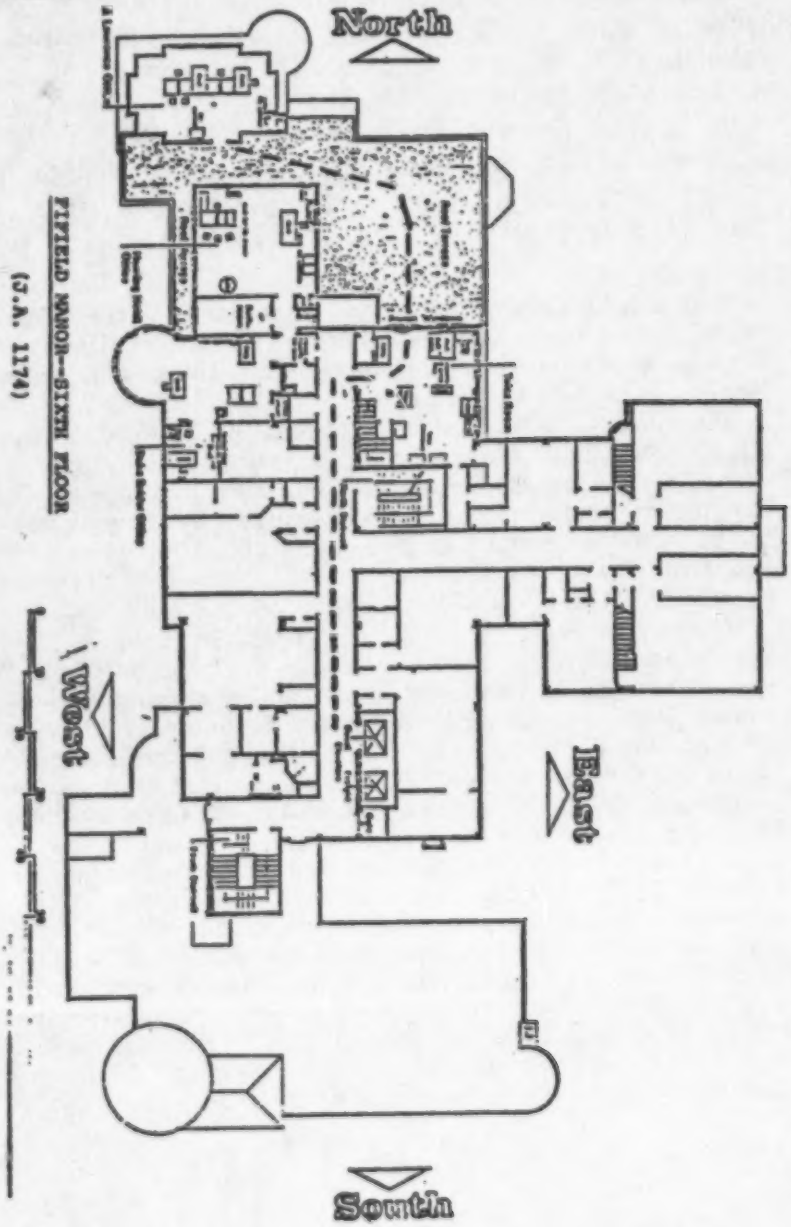
[49] At Fifield Manor, defendants point out that the "Telex room" across from the Heldt suite was searched. However, they have stipulated to the fact that nothing was seized therein. J.A. 1337-38.

At Cedars-Sinai, the agents did conduct a broad preliminary search throughout the facility, but this was done only to ensure the safety of the agents, to prevent sabotage to the building or the documents, and to locate the file cabinets mentioned in the warrant. *See* Tr. 8/23, at 255; United States v. Hubbard, *supra*, 493 F. Supp. at 277. No documents were seized during this preliminary search. *See* J.A. 132; 152.

However, later in the morning, a Cedars-Sinai search team entered an area of the first floor labeled the "Action Bureau," and seized a small number of documents concerning "codes." United States v. Hubbard, *supra*, 493 F. Supp. at 228; Tr. 7/16 at 243-50, 256-57. The "Action Bureau" was not mentioned in the warrant or affidavit as being subject to the search, *see also* Gov't Br. at 22 n.23, and Agent Oppy admitted that he continued to search this "Bureau" despite knowing that it was not the "Information Bureau" specified by the warrant. Tr. 7/16 at 248. Although this search of the "Action Bureau" violated the area limitations of the Cedars-Sinai warrant, *see* Church of Scientology v. United States, No. CV-77-2565-MML, (C.D. Cal. July 5, 1978), Mem. Dec. at 14-16, J.A. at 243-45, the few documents seized therein were returned by the government, United States v. Hubbard, *supra*, 493 F. Supp. at 228, and not submitted as part of its case-in-chief against defendants. *See* note 29 *supra*.

of the roof extending outside Mr. Heldt's office,[50] was not

[50] A path from the public hallway elevators to the Lawrence office structure (bottom left) which avoids the Heldt suite is illustrated by a broken line on the map here reproduced:



mentioned in the warrant; yet her office was searched and many documents therein seized. The question is whether or not her office could reasonably have been viewed by the searching agents as constituting part of "the suite of offices of Mr. Henning Heldt[.]"

Appellants contend that it could not for several reasons. First, the agents who conducted the search, in their "302 forms" (dictated on July 8 and 14) describing the location from which documents were taken, designated the hut as "the office of Janet Lawrence."[51] Second, Mrs. Lawrence informed the agents that the hut was her office, not Mr. Heldt's, and that she did not work for Mr. Heldt.[52] Despite her statement, and despite the lack of any information which might have contradicted Mrs. Lawrence, including any marking or identification on the hut, the agents ignored her and demanded entry. The most important factor, however, is contended to be the physical discontinuity of the Heldt suite and the Lawrence office.[53] To reach the latter from the former the agents had to go outside onto the roof of the Manor, and approach the free-standing penthouse structure, which was approximately nine feet from Heldt's office windows. Since the penthouse office was independently locked, access to the Heldt offices would not also provide access to it. Further, it is undisputed that the structure could be easily reached without ever entering the Heldt suite of offices.[54]

These contentions were responded to by the District Court which examined the premises and found in *United States v. Hubbard*, *supra*, 493 F. Supp. at 226, 227:

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[51] J.A. 1273, 1276. *See also* Govt. Stipulation, J.A. at 1278 ("On July 8, 1977, documents were seized by FBI agents from the office of Janet Lawrence").

[52] *See* Tr. 7/6, at 291-92, 294.

[53] *See* note 50 *supra*.

[54] *See* Tr. 7/6 at 417-18; Tr. 8/29 at 324-30.

The only controversial question with respect to the scope of the Fifield Manor search was the activity in Janet Lawrence's office and the telex room. In deciding this issue, the Court was greatly aided by the view of the premises taken at the defendants' request. As one enters the inner office of Henning Heldt, one is struck by the appearance of a hut across the terrace of the roof.[15] *Access to the hut is available through French doors in the Heldt office.* From the vantage point of an agent attempting to locate the boundary of the Heldt suite, it would be reasonable to assume that this hut, right outside the doors of the Heldt office, would be part of the suite. Much has been made of the strict definition of a "suite." Webster's Third New International Dictionary defines "suite" as "a series or group of things forming a unit or constituting a complement or collection: SET: as a (1): a group of rooms designed for occupancy as a unit." Since the *nearest entrance* to the hut was through the office of Henning Heldt, it was logical to assume that those offices formed a unit. In fact, Janet Lawrence testified that she, and her co-workers in the hut, *had to use the restroom in the Heldt office.* Trans. of August 29, 1979 at 326. She further testified that on the day of the search the office was *unmarked;* thus, there was nothing to indicate that it did not constitute part of the Heldt suite. Trans. of August 29, 1979 at 346-47. (Emphasis added).

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[15] The Court paced off the distance between the Heldt office and the hut. The distance is approximately nine feet.

The statement of Mrs. Lawrence that the hut was not Heldt's office was hardly the statement of an unbiased witness who should have been permitted to lay down the boundaries for the agents' search. Access to the penthouse could be had through the French doors in Heldt's private office, nine feet from the penthouse entrance,

and the bathroom used by the occupant of the penthouse was in the Heldt office. The long route to reach the "Lawrence" room does not impress us as a reasonable alternative.

These factors taken together convince us that entry into Lawrence's office was not outside the area limitation of the Fifield Manor warrant. The District Court's finding to that effect is not clearly erroneous and must be sustained. *See generally Campbell v. United States*, 373 U.S. 487 (1963); *United States v. Rischard*, 471 F.2d 105, 107 (8th Cir. 1973); *United States v. Tallman*, 437 F.2d 1103 (7th Cir. 1971); *United States v. Nardone*, 127 F.2d 521 (2d Cir.), *cert. denied*, 316 U.S. 698 (1942). Evidence seized therefrom was therefore properly seized. The defense, moreover, has conceded that none of the documents seized from Mrs. Lawrence's office were used as evidence-in-chief by the prosecution,[55] and has failed to make even a colorable argument that they were used in any other fashion by the government. *Cf.* Br. for App. Hubbard at 64-5. Seizure of documents from Lawrence's office thus did not affect defendants' conviction in any way. And this search does not constitute evidence of flagrant disregard for the warrant. The agents did not act capriciously or wantonly in searching the Lawrence office. On the contrary, they entered only after an Assistant United States Attorney was consulted by the agents in charge, and a deliberate, collective decision was made to proceed,[56] a decision not without some good faith, rational basis.[57] The search of

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[55] Statement by Mr. Boudin at oral argument. *See also* note 29 *supra*.

[56] See Tr. 7/19 at 5655-63.

[57] One agent, for example, who searched the Lawrence office apparently believed (erroneously) that it was part of the Heldt suite because access to it could only be obtained by entering Heldt's personal office. Tr. 7/20 at 6029-30. We note further that there were no washroom facilities in the

Mrs. Lawrence's office therefore was valid and does not constitute evidence of a general search requiring suppression of documents seized from the Heldt suite at Fifield Manor. *See* cases cited at pp. 43-44, *supra*.

3. *Seizing Items Not Mentioned in the Warrant—Limitations on the Plain View Doctrine*

We have already noted that the particularity requirement of the fourth amendment "prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marron v. United States*, 275 U.S. 192, 196 (1927). Thus, in general, only items particularly mentioned in the warrant may be seized. *See, e.g., United States v. Bills*, 555 F. 2d 1250, 1251 (5th Cir. 1977); *United States v. Dzialak*, 441 F.2d 212 (2d Cir.), *cert. denied*, 404 U.S. 883 (1971); *United States v. Alloway*, 397 F.2d 105, 110 (6th Cir. 1968). *See also United States v. Kirschenblatt*, 16 F.2d 202, 203-04 (2d Cir. 1926). Applying this rule with unmitigated rigor, however, would preclude the seizure of any item, no matter how obviously incriminating at a glance, simply because the searching officer happened to be glancing pursuant to a search warrant. In *Coolidge v. New Hampshire*, *supra*, a plurality of the Supreme Court found that under certain circumstances the police may seize objects in "plain view" when they are searching pursuant to a warrant, even though the warrant does not specify those objects. The Justices recognized, of course, that an expansive interpretation of the plain view exception might swallow the rule of particularization, since

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Lawrence office, and that Mrs. Lawrence therefore had to make use of the facilities in the Heldt suite, a fact she admitted at the suppression hearing. *See* Tr. 8/29 at 326.

> *any* evidence seized by the police will be in plain view, at least at the moment of seizure. The problem with the "plain view" doctrine has been to identify the circumstances in which plain view has legal significance rather than being simply the normal concomitant of any search, legal or illegal.

Coolidge v. New Hampshire, *supra*, 403 U.S. at 465 (original emphasis).

Unless these circumstances are identified and applied, any warrant authorizing a search for a particular document might, in conjunction with the plain view exception, permit "a government official to use a seemingly precise and legal warrant only as a ticket to get into a man's home, and, once inside, to launch forth upon unconfined searches and indiscriminate seizures as if armed with all the unbridled and illegal power of a general warrant." *Stanley v. Georgia*, 394 U.S. 557, 572 (1969) (Stewart, J., concurring). Clearly, the plain view exception must be defined in such a way as to preclude using a document search warrant as authority to search for and seize all evidence of wrongdoing in the form of documents which happen to be located at the search site.

Based upon *Coolidge*, courts have formulated three limitations upon the plain view exception. First, the searching agents must lawfully be in the location where their plain viewing occurs, *i.e.*, seizures based upon plain view can occur only within the geographical limitations set out, or implied, in the warrant.[58] Second, any seized item unspecified in the warrant must possess an incriminating character plainly and immediately apparent on its face, a character sufficiently incriminating to establish probable cause for its seizure despite the absence of a warrant mentioning it. Third, the searching agents must

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[58] See Part II C(2) *supra*.

come upon the unspecified items inadvertently. We find the first limitation satisfied, and turn immediately to the latter two.

The requirement that items seized under plain view must display a plain, immediately apparent incriminating character derives from the need to protect the integrity of the warrant and prevent against random rummaging.

> [T]he extension of the original justification [for the search warrant] is legitimate only where it is immediately apparent to the police that they have evidence before them; the "plain view" doctrine may not be used to extend a general exploratory search from object to another until something incriminating at last emerges.

Coolidge v. New Hampshire, *supra*, 403 U.S. at 466. Many courts have applied this limitation to cases involving seized documents where the warrant authorizing the search did not specify them. *See, e.g., United States v. Ochs*, 595 F.2d 1247, 1257 & n.8 (2d Cir.), *cert. denied*, 444 U.S. 955 (1979) (numerous cases cited). The incriminating character limitation necessarily permits a brief perusal of documents in plain view in order to determine whether probable cause exists for their seizure under the warrant. *See generally id.* at n.8 (cases cited). If in the course of that perusal, their otherwise incriminating character becomes obvious, they may be seized. *Id. See Mapp v. Warden*, 531 F.2d 1167, 1172 (2d Cir), *cert. denied*, 429 U.S. 982 (1976) ("it would be somewhat absurd to require an investigator to be oblivious to that which would be apparent to anyone else with normal powers of observation"). Otherwise, the perusal must cease at the point at which the warrant's inapplicability to each document is clear. Searching officers may not cart away documents unspecified by the warrant which simply look somewhat suspicious, comb

through them carefully at their leisure and then return them if they do not constitute evidence of criminal activity. That sort of abuse would return us to the days of the general warrant and must be scrupulously avoided.

The other, closely related limitation on the admission of unspecified documents seized under a search warrant is that of inadvertence.[59] This requirement has been subjected to substantial scholarly criticism, *e.g.*, 2 W. LAFAVE, SEARCH AND SEIZURE § 4.11(d) (1978); *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 244-46 (1971), and has been unevenly applied by courts. *Compare, e.g., United States v. Davis*, 542 F.2d 743, 745 (8th Cir.), *cert. denied*, 429 U.S. 1004 (1976), *and United States v. Wysong*, 528 F.2d 345 (9th Cir. 1976) (both courts characterize as "inadvertent" discovery of items as to which it appears police could have made showing of probable cause to seize, but failed to do so), *with United States v. Winston*, 373 F. Supp. 1005, 1007 (E.D. Mich. 1974) (seizure of item cannot be "inadvertent" if, before searching begins, police have probable cause to seize it). In the context of this case we believe the inadvertence limitation stands for the simple proposition that agents must not be searching for items outside the particulars of the warrant when they conduct the search; in other words, agents must act in good faith to confine themselves to searching for the specified items.[60] If, while conducting a search reasonably designed to find the specified items, an agent observes an unspecified item for which probable cause to seize exists on its face, he may seize it. He may not, however, seek a warrant or conduct his search for the purpose of looking for items not included in the warrant; rather,

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[59] *See* Coolidge v. New Hampshire, *supra*, 403 U.S. at 469-70

[60] *See generally* United States v. Rettig, *supra*, 589 F.2d at 423.

if he finds and seizes such items, he must do so truly "inadvertently."

Applying the good faith/inadvertence limitation in this case, we find no persuasive evidence that the search was merely a subterfuge to examine or seize other evidence not specified in the warrant. *See United States v. Hubbard, supra*, 493 F. Supp. at 231. On the contrary, it appears that the agents, in their preparation and execution of the search, intended to look only for evidence concerning the offenses alleged in the warrant and affidavit, specifically, evidence which was arguably within the scope of Item 162 if not within the other 161 items.[61]

Turning to the question of compliance with the immediately apparent incriminating character requirement, we note that the district court failed to note with specificity how many documents were taken pursuant to the plain view doctrine, or how many of those seized under plain view actually met the incriminating character requirement. The court did decide that "red-box data," and other documents discussing infiltration and covert operations directed against private and state organizations, satisfied this limitation. *Id.* at 231-33. But it did not discuss numerous other documents alleged not to have possessed an immediately apparent incriminating character, and admitted frankly that "[p]erhaps some documents were seized outside the warrant." *Id.* at 234. For their part, defendants allege that up to 71% of the documents were outside the particulars of the warrant, and thus their seizure could be justified only on the basis of plain view;[62] they make no effort, however, to estimate how many of these alleged "plain view documents" were seized in violation of the incriminating character

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[61] *See* notes 37, 42-48 and accompanying text, *supra*.

[62] *See* App. Br. I at 37-41. The government's figure is around 50.

limitation. The court found the basis for the 71% figure to be "valueless due to basic analytical flaws in [the] interpretation of the warrant." 493 F. Supp. at 233. The Scientology claim was also based on a random sample of only 400 documents out of 23,000 that were evaluated by a law firm representing appellants and by fifty "clerks" all of whom were members of the Church of Scientology (Tr. July 17 at 5075-80, 5103). While we do not accept the defendants' figure as necessarily accurate, and while we recognize the district court's finding that at least some of the "plain view documents" satisfied the incriminating character limitation, this still leaves us with the possibility that many documents were improperly seized under the plain view doctrine.

Assuming *arguendo* that numerous documents not specifically discussed by the district court in its treatment of plain view failed to meet the incriminating character limitation,[63] we would still not hold that total suppression is required in this case. Although it certainly would have been preferable to have had a finding based upon an actual examination of the questioned documents, we believe here that the reasonableness of the execution of a search can be determined from the subjective and objective behavior of the participants during the search, as revealed by eyewitness testimony.[64] The end result of

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[63] Indeed our examination of a number of the defense exhibits makes clear that the requirement was not met in some cases. *See, e.g.*, Def. Exhs. 277, 665, 51, 52, 53, 489, 498, 589A, 589B, 621, 620, 488, 500, 469 (all discussed at App. Br. I at 31-34).

[64] It is for the district court, of course, to decide in the first instance whether these two safeguards—incriminating character and good faith/inadvertence—were observed during the search, and that court may employ any appropriate means to make the determination. For example, an examination here by the district court of those documents alleged not to have been listed in the warrant, or an examination of

the search certainly is a legitimate factor to consider in evaluating its overall reasonableness, but it is not always an indispensable ingredient of the decision. Thus a good faith attempt to stay within the boundaries of an inherently broad warrant will support a finding that the search—taken as a whole—was reasonable, even though a majority of documents seized might turn out not to qualify for inclusion on more leisurely reflection. We must emphasize at this point, however, that our concern with the agents' obedience to the limitations of the warrant relates solely to determining whether a violation of such egregious magniture occurred that *all* fruits of the search must be suppressed. *See* pp. 8-9 *supra*. If *particular documents* seized under the plain view exception had been admitted as evidence-in-chief against defendants and the admissibility of those documents had been put in issue before us, an entirely different analysis would be required.

In conclusion, despite the possibility that some (unspecified) documents seized under plain view failed the incriminating character requirement, we hold that the searches of Fifield Manor and Cedars-Sinai were not so

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a representative sample thereof, might have been very helpful in judging whether the incriminating character requirement was obeyed. The judge might have ordered a study to be performed by an impartial master, or might have done one himself drawing upon a mutually agreed upon sample. In this case the trial court relied upon witness testimony to reach his conclusion, which we find supported by the record. *See* discussion at Parts II C(1) & (2) *supra*.

We also find that the district court acted reasonably in rejecting defense counsel's proffered studies purporting to analyze the seized documents. These studies were found to be unreliable due to various methodological flaws. *see* United States v. Hubbard, *supra*, 493 F. Supp. at 233; also, they might properly have been rejected because the subjective evaluations involved in them were performed by persons who might reasonably have been thought to be partial to one side.

unreasonable that total suppression is required. Nor, so far as we can tell, were any documents which were admitted into evidence against defendants seized in violation of the area or plain view limitations discussed above. Hence, by way of a somewhat different rationale, we affirm the district court's conclusion that the seized documents in this case need not be suppressed.

III. Disqualification of the Trial Judge

Just prior to sentencing on December 4, 1979, the defendants moved pursuant to sections 144 and 455 of Title 28 to recuse the trial judge from the sentencing process. The principal ground upon which the motion was made was a claim that the trial judge had deceptively concealed from the defendants the cause of the security measures taken during the Los Angeles proceedings.[65] In a memorandum opinion filed on December 14, 1979, the court denied the motion upon a number of grounds. First, the court held the motion untimely. Second, the court found that defendants did not file an affidavit of personal bias or prejudice as required by 28 U.S.C. § 144. Finally, the court concluded that the security measures it took in Los Angeles would not lead a reasonable person to question the court's impartiality. *United States v. Hubbard*, Cr. No. 78-401 (D.D.C. De-

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[65] In their motion for recusal, appellants described the "unusual security precautions" as follows:

> There was a table outside the courtroom with a sign that stated that all people had to be searched. There was a metal detector outside the courtroom. A security officer was observed with a loaded AR-15 automatic rifle in the courthouse on that day . . . . The courtroom used in this case was the only one that had a security table outside it or that had more than the usual number of marshals in it during that period. The Judge was accompanied at all times in or about the courtroom by two marshals . . . .

Motion at 4, *reprinted in* J.A. at 1121.

cember 14, 1979) (memorandum denying motion for evidentiary hearing and recusal).

The defendants contest the trial court's conclusions. They argue that their motion was timely because it was filed within a short time after they discovered "evidence of deception." In addition, they contend that the judge's concealment of the reasons for the security measures gives "rise to an inescapable inference of bias against the defendants." Appellant's Brief II at xvii.

Although appellants moved pursuant to 28 U.S.C. § 144 and 28 U.S.C. § 455, they have essentially abandoned their argument to the extent it is based on section 144, *see* Appellants' Reply Brief II at 2 n.1, probably because their motion was not accompanied by the affidavit of a party as required by that section. Appellants correctly note, however, that section 455 does not require the filing of an affidavit, and, since recusal can be sustained under that section on the same ground that exists in 144, appellants have lost little by dropping their section 144 claim.

Section 455, as amended in 1974, contains two provisions pertinent to this case. Subsection (a) states:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Subsection (b)(1) adds:

> He shall also disqualify himself in the following circumstances:
>
> Where he has a personal bias or prejudice concerning a party . . . .

28 U.S.C. § 455(a), (b)(1).

Appellants' claim of bias is largely dependent on the following exchange between court and counsel, which occurred on the first day of the Los Angeles hearing:

MR. NUSSBAUM: Your Honor . . . I have never been involved in a case before where there were unusual security measures, so I don't really know why they are made, and how far they ought to go.

. . .

MR. NUSSBAUM: Nothing untoward has happened, as the Court is aware of, that we might not be aware of, to explain the security measures?

THE COURT: No.

I will merely say this:

That this Court, along with, as you know, some of the other judges of my Court, has been under special security—maybe you don't know it—under special security that is unrelated to this case.

That is why some marshals are with me now, and have been for a considerable period of time.

Tr. 7/3/79 at 11-12.

Defendants contend that the court's response was untrue in a number of respects. First, they suggest that neither Judge Richey nor any of his colleagues had been under any special security prior to the hearing. Second, they posit that the marshals had not been with Judge Richey for a considerable period of time. Third, they submit that the special security was in fact related to their case.

Having discovered this evidence of deception, the defendants argue that a number of other occurrences took on a different light—they refer to the "hallway incident," the "first elevator incident," the "second elevator incident," the denial of jury venire information, the disposition agreement and the release of documents, and, finally, the sentencing itself. Before turning to the substance of appellants' claim, we must first consider whether appellants' motion was timely filed.

The trial judge's conclusion that defendants were tardy in bringing their motion to recuse does not lack support in the record. Their claim that several incidents suddenly took on a different light once they learned that

the trial judge had misled them concerning the reasons for the security in Los Angeles appears somewhat disingenuous. Even if we assume that those incidents are probative of prejudice or bias, we cannot believe that the dim light shed upon these matters by the discovery of an alleged falsehood perpetrated by the judge is sufficient to make the innocent appear evil. Moreover, it would appear that at least some of the evidence upon which appellants rely to demonstrate the judge's deception was known by or available to them at the time of the contested statement. Appellants note that "[a] federal security officer was posted on the roof of the courthouse with an AR-15 automatic rifle and binoculars. Counsel were informed that he was there because of 'the Scientology case.'" Appellant's Brief II at 2 n.3 (citing Motion for Evidentiary Hearing and for Recusal at 4) (J.A. 1121).

Although section 144 contains an explicit timeliness requirement, section 455 has none. There is some disagreement over whether section 455 contains an implicit requirement of timeliness. *Compare In re International Business Machines Corp.*, 618 F.2d 923, 932 (2d Cir. 1980) (timeliness requirement) *with SCA Services, Inc. v. Morgan*, 557 F.2d 110, 117 (7th Cir. 1977) (no timeliness requirement). In the present circumstances, since the tardiness of appellants' motion is not entirely free of doubt, we choose not to reach this question. Instead, we will address the issue of disqualification as if it had been raised in a timely fashion by the parties or the court had *sua sponte* considered it. We therefore turn to an examination of the requirements imposed by the recusal statute.

Now that section 455 contains a provision calling for disqualification in a "proceeding in which [a judge's] impartiality might reasonably be questioned," [66] we join

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[66] 28 U.S.C. § 455(a). Prior to its amendment in 1974, section 455 provided in full:

our sister circuits in concluding that a showing of an *appearance* of bias or prejudice sufficient to permit the average citizen reasonably to question a judge's impartiality is all that must be demonstrated to compel recusal under section 455.[67] A showing of the appearance of bias or prejudice would seem necessarily to raise a reasonable question concerning the judge's impartiality. We must therefore test appellants' motion on the basis of whether or not they have established an appearance of bias or prejudice, as judged by an objective standard.

We note initially that section 455 gives no guidance concerning procedure.[68] Under section 144, the judge must determine the legal sufficiency of the affidavit required by that section accepting as true the facts stated with particularity therein. If those facts demonstrate

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> Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appear, or other proceeding therein.

[67] *See* United States v. Mirkin, 649 F.2d 78 (1st Cir. 1981); In re International Business Machines Corp., 618 F.2d 923, 929 (2d Cir. 1980); Rice v. McKenzie, 581 F.2d 1114 (4th Cir. 1978); Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1111 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 78 (1981); Roberts v. Bailar, 625 F.2d 125, 129 (6th Cir. 1980); SCA Servs., Inc. v. Morgan, 557 F.2d 110 (7th Cir. 1977); United States v. Poludniak, No. 80-2133 (8th Cir. Aug. 14, 1981); Wood v. McEwen, 644 F.2d 797, 802 (9th Cir. 1981); United States v. Ritter, 540 F.2d 459 (10th Cir.), *cert. denied*, 429 U.S. 951 (1976).

[68] C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE § 3550 (1975); Comment, *Disqualification of Federal Judges for Bias or Prejudice*, 46 U. CHI. L. REV. 236, 259 (1978).

bias, the judge must recuse himself. Section 455, since it imposes a duty directly upon the judge to evaluate his own conduct, requires no affidavit, and as noted *supra*, appellants did not file one in the district court. Their motion was accompanied by a memorandum of law, which contained allegations of fact that were verified by one of the defense counsel. We must decide how a trial judge should treat such a motion made for recusal pursuant to section 455.

Preliminarily, there is no support for the position that the facts alleged in the papers submitted by a person relying on section 455 must in every case be accepted as true, whether the papers be a verified memorandum or are in some other form. The very fact that section 455 is addressed directly to the judge makes it evident that some evaluation by the court of the facts giving rise to the motion is anticipated in most cases. The trial court may, of course, at its option transfer the matter to another judge for decision.[69] Further, it is well within the trial court's discretion as well as desirable in some cases to hold a hearing. The appropriate procedure, then, may depend upon the nature of the allegations made.[70] In this

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[69] Appellants do not argue that the trial judge erred by refusing to transfer the motion for recusal to another judge. In United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976) (*en banc*), *cert. denied*, 431 U.S. 933 (1977), this court held that under section 144 and predecessor section 455 the transfer to another judge for decision is "at most permissive." *Id.* at 131. *See also* In re Corrugated Container Antitrust Litigation, 614 F.2d 958, 903 n.9 (5th Cir.), *cert. denied*, 101 S. Ct. 244 (1980).

[70] Allegations regarding actual extrajudicial conduct or involvements, for example, may typically present a more compelling case for a hearing than a motion premised on rulings or comment made during actual courtroom proceedings which are urged as evidence of bias or prejudice stemming from an extrajudicial source.

case the motion for recusal, alleging an appearance of bias created by courtroom security measures, was denied without a hearing by the trial judge to whom the case was assigned. Under these circumstances, we believe the proper course on appeal is to accept as true the facts stated with particularity in appellants' verified recusal motion. Viewing the issue in this light, we nonetheless reject appellants' argument for recusal.

Appellants recognize that disqualification based on prejudice is required only if the alleged prejudice stems from an extrajudicial source.[71] Because every instance upon which appellants rely to demonstrate the trial judge's bias is either a judicial ruling or some other conduct that occurred during the judge's fulfillment of his judicial duties, we are tempted to reject appellants' argument out of hand. Recognizing the legal requirement of an extrajudicial source, however, appellants have attempted to create an inference of such fact on

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[71] United States v. Haldeman, 559 F.2d 31, 132-34 & n.297 (D.C. Cir. 1976) (*en banc*), *cert. denied*, 431 U.S. 933 (1977).

> For a long time before enactment of new § 455(a) in 1974, the judicial understanding of § 144 and old § 455 was that they were to be confined in operation to extrajudicial conduct or conditions. . . . Nothing we have observed in the legislative history of new § 455(a) suggests that this construction should be overturned. Absent clearer guidance as to the congressional intent, we agree . . . . The appearance-of-impropriety standard in terms summons a disqualification, not merely when the judge's impartiality might somehow be questioned, but only when it may *reasonably* be questioned. We think reasonableness of the challenge must take due account of the effect which its acceptance will have on the judicial process. So drastic would be the impact that we are unwilling to ascribe to ethical and legislative formulators of that standard a purpose to direct it toward judicial rulings on questions of law.

559 F.2d at 133 n.297. *See* In re International Business Machines Corp., 618 F.2d 923, 929 (2d Cir. 1980); United States v. Grinnell Corp., 384 U.S. 563, 583 (1966).

the basis of courtroom conduct.[72] They submit first that the security precautions taken during the Los Angeles proceedings were related to the Scientologists.[73] Second, they offer the observation that security precautions are usually invoked based upon fear of bodily harm.[74] Appellants then argue that since there is nothing in the record to support the judge's fear of any of the defendants, that fear must be extrajudicial in origin. The final link in this chain of inference is that a deceptive concealment of the reasons for the security evidences prejudice against the defendants. Thus, from an allegedly deceptive statement made concerning courthouse security, defendants draw conclusions both of prejudice and an extrajudicial source of that prejudice. We are unable to accept either conclusion.

First, defendants do not persuade us that the source of the judge's fear was extrajudicial. We disagree with defendants that the record contains nothing that might cause the judge to fear for his safety, for the safety of government witnesses, or for the orderliness of the proceedings. The indictment, *inter alia*, charged the defendants with an unlawful conspiracy to steal government

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[72] Appellants note correctly that particular judicial rulings can be *evidence* of an extrajudicial bias or prejudice. Appellants' Brief II at 32.

[73] Shortly before oral argument in this court, appellants moved to augment the record on appeal with what they described as "concrete evidence confirming the trial court's deception and bias." Appellants' Reply Brief II at 4 n.3. This motion was granted, but we have no occasion to consider the strength of these submissions, since we are accepting as true the facts stated in support of appellants' motion for recusal, which facts included a claim that the trial court deceptively concealed the reasons for the Los Angeles security.

[74] Security precautions, however, may also be taken to avoid disruption of court proceedings. *See, e.g.*, Lacaze v. United States, 391 F.2d 516, 520-21 (5th Cir. 1968).

documents by illegal entry into federal offices and by a conspiracy to obstruct justice by subordination of perjury before the grand jury. The Disposition Agreement led to judgments that the defendants were guilty of a conspiracy to obstruct justice with respect to their involvement in the illegal entries. The overt acts alleged as evidence of the conspiracies included handcuffing, gagging, arresting and kidnapping Meisner and imprisoning him under guard when it appeared he was on the brink of surrendering to federal authorities, and harboring a fugitive from justice. These are not placid crimes. Substantial force was used in confining Meisner. In a letter of June 3, 1977, Mary Sue Hubbard told Henning Heldt "to utilize resources to figure out a way to defuse [Meisner] should he turn traitor." Indictment ¶ 14(45) (J.A. 140). The word "defuse" is not defined, but in light of the hostile acts already directed against Meisner, a reasonable interpretation could include severe bodily injury. Indeed, the search of Scientology's Washington headquarters turned up a *loaded* gun. *United States v. Hubbard*, 493 F.Supp. 209, 232 n.20 (D.D.C. 1979). Under these extreme facts, it was entirely reasonable to take the security precautions that were taken and we refuse to second-guess the district judge and the Marshal's service in their decision to institute security. Consequently, we are unable to agree with defendants that the basis for institution of security must necessarily have been extrajudicial. Indeed, substantial security measures, only slightly less exacting, have been permanently employed for a considerable period of time at the United States Courthouse in Washington, D.C. where Judge Richey regularly hears cases.

Further, even if we were to accept all that appellants would have us assume—that the judge misrepresented the facts when he said the security was unrelated to the Scientology case and that the source of the judge's fear could only be extrajudicial—we could not accept appel-

lants' position that this necessarily evidences prejudice against defendants. Scientology's officers and undoubtedly some of its members were highly agitated against the government, as is proved by the widespread organization of the conspiracy and the extreme measures that the conspirators took in an effort to achieve the unlawful objectives. When an organization or its leaders are involved in judicial proceedings, security measures are properly implemented to protect against an overzealous rank and file member of the organization who overreacts to the action taken against his leaders or institution.[75] If the judge had reasonable grounds to fear that appellants or some isolated member of the Church might be carried away by the passion of the moment and take some rash action, he had no obligation to tell them or their counsel that the security was imposed for that reason. Tight security measures, which as stated above are routine in the United States District Courts in the District of Columbia, are, for the most part, irrelevant to the merits of a criminal prosecution, especially in a nonjury suppression hearing. Indeed, the effectiveness of security measures may be diminished if their existence or purpose is disclosed.

The question posed, then, is the relevance to the question of prejudice of a judge's concealment of a fact which has no bearing on the merits of the case. An appellate court cannot approve of judicial deceit, but the ultimate issue faced by this court is the probative value of an alleged deception on the issue of prejudice. Even if it occurred, the concealment, as it is here alleged, is not sufficient to raise the appearance of prejudice in the mind of a reasonable person who is familiar with all the facts.

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[75] *See, e.g.*, People v. Remiro, 89 Cal. App. 3d 809, 153 Cal. Rptr. 89, 115 (Cal. App.) (photography, fingerprinting and search of spectators at trial of Symbionese Liberation Army member), *cert. denied*, 444 U.S. 876, 937 (1979).

From all the circumstances it appears that a reasonable explanation of the judge's statement is that it was an inartful attempt to tell appellants that the security measures were a matter for the court and the Marshal to determine. The court also may have been motivated to protect the defendants from the damaging publicity that might have resulted from a statement by the court as to their numerous illegal acts as disclosed by the court file. In any event, in our judgment appellants have not carried their burden of establishing the appearance of prejudice.

Our determination that appellants' argument concerning the judge's remarks regarding security is unavailing obviates any extended discussion of the other incidents claimed to evidence prejudice. The elevator incidents and the hallway incidents suggest little if anything about prejudice. The reliance upon a number of rulings made by the judge is clearly misplaced: not only do the rulings appear unexceptionable, they are incapable of supporting a finding of extrajudicial, personal prejudice.

Appellants also suggest that the trial court's failure to assign the case to another judge for sentencing after having heard the proceedings to enforce the Disposition Agreement required recusal under section 455(b)(1), which makes "personal knowledge of disputed evidentiary facts concerning the proceeding" grounds for disqualification. The short answer to this argument is that knowledge gained through the court's judicial role is not "personal" knowledge within the meaning of the statute. *United States v. Winston*, 613 F.2d 221 (9th Cir. 1980). The conclusion must be the same if the judge's knowledge is said to create an appearance of prejudice under section 455(a). *In re Corrugated Container Antitrust Litigation*, 614 F.2d 958, 965 (5th Cir.), *cert. denied*, 101 S. Ct. 244 (1980); *United States v. Lyon*, 588 F.2d 581 (8th Cir. 1978), *cert. denied*, 441

U.S. 910 (1979); *United States v. Cepeda Penes*, 577 F.2d 754, 757-58 (1st Cir. 1978); *United States v. Wolfson*, 558 F.2d 59 (2d Cir. 1977).[76]

We are mindful of the counsel given by the Senate Judiciary Committee regarding amended section 455:

> [I]n assessing the reasonableness of a challenge to [a judge's] impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision. Disqualification for lack of impartiality must have a *reasonable* basis. Nothing in this proposed legislation should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a "reasonable fear" that the judge will not be impartial. Litigants ought not to have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice.

S. Rep. No. 93-419, 93d Cong., 1st Sess. 5 (1973) (emphasis in original). The trial judge properly determined

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[76] Appellants' reliance upon Fed. R. Crim. P. 11(e)(1), which enjoins the trial judge from participating in discussions regarding plea agreements, is not persuasive. That rule seeks to avoid the appearance of prejudice that can arise where a judge might be thought to be pressuring a defendant into accepting a particular agreement. *See* Advisory Committee Notes to 1974 Amendment of Fed. R. Crim. P. 11. *Cf.* Longval v. Meachum, 651 F.2d 818 (1st Cir. 1981) (state court denied due process by urging plea bargain), *petition for cert. filed*, 50 U.S.L.W. 3131 (Sept. 8, 1981) (No. 81-261). The prejudice claimed here, however, is one that existed *after* the enforcement proceedings, if ever. In any event, "the mere fact that a judge has participated in plea discussions . . . does not provide a reasonable basis for questioning a judge's impartiality." United States v. Cepeda Penes, 577 F.2d 754, 758 (1st Cir. 1978).

that he was under no obligation to recuse himself from this case.

IV. Disqualification of the Prosecutors

Shortly before the suppression hearing defendants moved to disqualify the entire office of the United States Attorney for the District of Columbia from prosecuting this case on the grounds (1) that the office had a disqualifying emotional interest in the outcome of the case since it was the "victim" of one of the crimes alleged in the indictment and (2) that one of the United States Attorneys had been employed by a law firm which represented one of the defendants. The district court, in a memorandum and order filed July 30, 1979, denied defendants' motion. *United States v. Hubbard*, Cr. No. 78-401 (D.D.C. July 30, 1979) (memorandum opinion denying motion to disqualify prosecutors) (J.A. 269).

Initially, we are not persuaded by appellants' argument that because the indictment charged some of the defendants with illegally entering the office of a member of the United States Attorney's office all the assistants in the office had a disqualifying interest in this prosecution. Appellants mistakenly contend that the United States Attorney's office was the "victim;" to the extent that a "victim" exists in such a crime, it is the United States of America. As the district court noted in denying defendants' motion, "[i]n this case, none of the Assistant United States Attorneys actually prosecuting the case has been a victim of any of the charges in the indictment. Further, none of the government attorneys has shown any special emotional stake in the outcome of the case." *Id.* (J.A. at 273). The illegal entry into one of the offices in a large United States Attorney's office would require facts beyond those present here to disqualify all of the lawyers in the office from prosecuting the offenders.

Appellants have apparently abandoned their argument that the Assistant United States Attorney's brief employment with one of the law firms that represented a defendant constituted a disqualifying interest. In its place they now contend for the first time that they were denied due process because two prosecutors were defendants in a civil action filed by the Church of Scientology ten days after the search of Scientology's offices in Los Angeles, which suit "alleged that the raids of July 8 were conducted in bad faith, with the intention of violating [Scientology's] constitutional rights." Appellants' Brief II at 17. *See Church of Scientology v. Linberg*, No. CV-77-2654 (C.D.Cal., filed July 18, 1977) (J.A. 1192).

Because of the failure to raise the matter before the district court we hold that the issue is waived on this appeal. *Kassman v. American University*, 546 F.2d 1029, 1032 (D.C. Cir. 1976) (per curiam); *Miller v. Avirom*, 384 F.2d 319, 321-23 (D.C. Cir. 1967). This is not a court of original jurisdiction. We recognize that this principle must give way whenever justice so requires, *id.*, but our analysis of the record does not indicate that this is such a case. We take this opportunity, however, to discuss the due process concerns raised by appellants' motion. We conclude that, whether the supposed interest of the prosecutors in such a situation is characterized as a pecuniary one or as a personal or "emotional" one, the due process argument is without merit on the facts of this case.

It is of course improper for a prosecutor to participate in a case when he has a pecuniary interest in the outcome. 18 U.S.C. § 208 (1977). *See Sinclair v. Maryland*, 278 Md. 243, 363 A.2d 468 (1976); *People v. Jimenez*, 187 Colo. 97, 528 P.2d 913 (1974); *State v. Detroit Motors*, 62 N.J. Super. 386, 163 A.2d 227 (N.J. Super. 1960). The threat posed to a prosecutor's interests in his personal and professional reputation by a *bona fide*

civil action alleging bad faith in the performance of official duties should give rise to a similar concern. *See, e.g., State v. Cox*, 246 La. 748, 16 So.2d 352, 357 (1964); Oregon State Bar Comm. on Legal Ethics, Opinions, No. 386 (1978). *See also* 28 C.F.R. § 45.735-13(a) (1980). The conflict in such cases arises because a public prosecutor, as the representative of the sovereign, must "seek justice—to protect the innocent as well as to convict the guilty." *Pennsylvania v. Dunlap*, 474 Pa. 155, 377 A.2d 975, 976 (1977) (Roberts, J., dissenting from affirmance by an equally divided court). *See Berger v. United States*, 295 U.S. 78, 88-89 (1935); ABA Code of Professional Responsibility EC 7-13 (1980). Our system of justice accords the prosecutor wide discretion in choosing which cases should be prosecuted and which should not. If the prosecutor's personal interest as the defendant in a civil case will be furthered by a successful criminal prosecution, the criminal defendant may be denied the impartial objective exercise of that discretion to which he is entitled.

The government contends that prosecutors cannot be disqualified when sued by a defendant because defendants could then remove whichever prosecutor they please simply by suing him.[77] The defendants contend that this is not so because all acts of a prosecutor taken in his quasi-judicial capacity enjoy the protection of absolute immunity, *see Imbler v. Pachtman*, 424 U.S. 409 (1975), and that therefore any suit complaining of an action taken in a prosecutor's quasi-judicial capacity would be frivolous and non-disqualifying. In contrast, when a prosecutor actually participates in a search he is engaging in investigative rather than quasi-judicial activity, *see Marrero v. City of Hialeah*, 625 F.2d 499 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 1353 (1981), and there-

[77] This contention would apply in many cases, and may have some application here, but we do not decide this phase of the case based on this argument.

fore loses his absolute immunity from suit if he actually participates in a search,[78] although retaining a qualified, good-faith immunity.[79]

This distinction in principle between quasi-judicial and investigative functions persuades us that a criminal defendant cannot routinely remove prosecutors he dislikes, or fears, by suing them. Unless the defendant can complain of some action taken by the prosecutor outside of his quasi-judicial capacity, such suit will generally be barred by absolute immunity. As we held recently:

> [A]bsolute immunity does not extend to a prosecutor engaged in essentially investigative or administrative functions. *Halperin v. Kissinger*, 606 F.2d 1192, 1208 (D.C. Cir. 1979), *aff'd by an equally divided Court per curiam*, 49 U.S.L.W. 4782 (June 23, 1981); *Briggs v. Goodwin*, 569 F.2d 10, 21 (D.C. Cir. 1977), *cert. denied*, 437 U.S. 904 (1978); *Apton v. Wilson*, 506 F.2d 83, 93 (D.C. Cir. 1974). However, when a prosecutor is engaged "in initiating a prosecution," his absolute immunity from civil suit is firmly established. *Imbler v. Pachtman*, . . . 424 U.S. at 431.

Dellums v. Powell, No. 80-1331, slip op. at 6-7 (D.C. Cir. July 24, 1981) (footnote omitted). The distinction serves the public interest in the administration of criminal justice. Most prosecutors participate in searches to some extent by drafting applications for search warrants and giving legal advice to agents conducting searches, and such practice is certainly encouraged. A loose disqualification rule based on legal advice rendered in an official capacity could disrupt the orderly process of crimi-

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[78] *See* Butz v. Economou, 438 U.S. 478 (1978); Marrero v. City of Hialeah, 625 F.2d 499 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 1353 (1981).

[79] *Id.* There is no showing here that the prosecutors did not act in good faith.

nal prosecutions without rendering any corresponding benefit to the public.

Although we thus recognize in principle the possibility of a disqualifying conflict arising out of a prosecutor's status as a civil defendant, we are nevertheless of the opinion that any conflict of interest that might have existed because two of the assistants here involved were made defendants in an action brought by Scientology based upon participation in an allegedly illegal search and seizure did not amount to a due process violation that would require vacation of appellants' sentences. Given the need to promote the appearance of justice, a trial court on timely motion should disqualify a prosecutor from participating in a criminal action when he has a personal conflicting interest in a civil case.[80] The question we face here, however, is the very different one of what should be done when defendants have failed to move to disqualify on the ground of a conflict of interest,[81]

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[80] The potential conflict of interest that might result from a personal civil suit filed against an Assistant United States Attorney (AUSA) by a defendant in a criminal case for acts undertaken by the AUSA in his official capacity in the criminal matter would have to be very strong before disqualification would be justified. It could not be justified by mere inference from the filing of the suit but would require *proof*, by clear and convincing evidence, of a prima facie case of misconduct on the part of the AUSA.

[81] Although it is apparent that appellants did not argue in their May 8, 1979, motion to disqualify that the prosecutors named in the civil suit had a conflict of interest, they contend on appeal that "[t]he district court was made fully aware that prosecutor Banoun, apart from being a witness to the search, was also a defendant in a pending civil suit arising from the search." Appellants' Brief II at 22. Appellants point to the transcript of the suppression hearing on July 16, 1979, when Assistant United States Attorney Banoun stated, "I am one of the defendants." Tr. 7/16/79 at 9. This statement was made during discussion concerning whether

yet assert a denial of due process on appeal. *See Magjuka v. Greenberger*, 46 A.D.2d 867, 362 N.Y.S. 2d 162, 163 (1974). We must reconcile the governmental interests in conserving judicial and prosecutorial resources [82] and in preserving the appearance of impartiality with the interest of the defendant in receiving fair and evenhanded treatment from his accusers. We believe the best resolution is to require in such circumstances that the defendants prove actual prejudice. *Cf. United States v. Birdman*, 602 F.2d 547, 559-60 (3d Cir. 1979) (actual prejudice standard applied where prosecutor testified before grand jury), *cert. denied*, 444 U.S. 1032 (1980). With regard to an appearance of conflict on the part of the prosecution, on appeal a defendant has cause to complain only if he was prejudiced. *See People v. Poplis*, 30 N.Y.2d 85, 281 N.E.2d 167, 330 N.Y.S.2d 365 (1972). To the extent he might receive relief from a prosecution solely on a showing of *potential* prejudice, he would be the undeserving beneficiary of a rule that attempts to pro-

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statements made by some of the agents who participated in the search to government lawyers in preparation for their defense in the civil action should be made available to the appellants.

Under some circumstances, the conflict of interest will be so strong that error might result if the trial court fails to disqualify a prosecutor from participation in a case when it learns of the facts giving rise to a conflicting interest. This, however, is not such a case. The alleged conflict of interest brought about by the prosecutors being named as defendants in the civil suit for acts taken in their official capacity is not at all apparent, as evidenced by the fact that appellants *never relied on it* as a basis for disqualification.

[82] *Cf.* In re April 1977 Grand Jury Subpoenas, 584 F.2d 1366, 1369 (6th Cir. 1978) (*en banc*) (denial of disqualification motion not appealable because delay could "exert unwarranted influence in the government's choice of its prosecuting attorney"), *cert. denied*, 440 U.S. 934 (1979).

mote the public good. In our judgment the strong governmental interest in expedient proceedings justifies a rule that gives the defendants on the facts of this case relief only if they can demonstrate prejudice; otherwise, the convictions will stand.[83]

Appellants have made no credible claim of actual prejudice based on the prosecutors' alleged pecuniary or personal interest in the outcome of this prosecution. In arguing that the pending civil suit produced a prejudicial conflict of interest in the prosecution, they argue primarily that "dismissal of the civil suit against Messrs. Banoun and Schuelke [was made] a bargaining chip in the disposition negotiations. . . . The government even sought to withdraw from an agreement it had reached with the defense on September 23, 1979 that did not include dismissal of the civil suit against Mr. Banoun and substitute for it an agreement that provided for such dismissal." Appellants' Brief II at 55-56. Appellants claim that this conduct evinces an effort by the prosecutors to manipulate the criminal case to their advantage

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[83] This case, involving an alleged conflict of interest on the part of the prosecution, is to be distinguished from cases in which the burden of showing actual prejudice is typically not imposed. The cause for concern here is not on a par with that present in a case where the defendants' own attorney is laboring under a conflict of interest. *see* Cuyler v. Sullivan, 446 U.S. 335 (1980), or where he is tried before a judge with an interest in the result, *see* Tumey v. Ohio, 273 U.S. 510 (1927). In such cases, the rights at stake are so fundamental that even if no actual prejudice is shown, reversal is required. United States v. Decoster (*Decoster III*), 624 F.2d 196, 201 (D.C. Cir. 1979) (*en banc*). While the prosecutor's duty "to seek justice," ABA Code of Professional Responsibility EC 7-13, cannot be minimized, the less fundamental nature of the threat to defendants, coupled with the government's responsibility to administer justice effectively on the public's behalf, makes actual prejudice the appropriate standard here.

in the civil matter. We note in passing that these same facts would equally well support the conclusion that defendants, by initiating a highly questionable lawsuit, were attempting to create for themselves a bargaining chip in order to obtain more favorable disposition of the criminal charges in the indictment. In any event, the argument need not detain this court long. First, the trial court enforced the agreement reached on September 23, 1979, which did not contain any provision that required Scientology to dismiss its claim against the prosecutors and other government personnel. Second, the Acting United States Attorney did not raise the issue of the civil suits until *after* September 23rd, the date upon which the court found the parties had agreed to the disposition it enforced. Relief from the civil actions was proposed only on September 26, as defense counsel apparently conceded shortly thereafter. *See* Transcript of Settlement Conference, Oct. 2, 1979, at 52. Finally, it appears, as the government suggests, that lead defense counsel had previously expressed a desire for a *complete* disposition:

> "Mr. Hirschkop: . . . If I could wrap it up *once and for all*, and not have to go through repeated prosecutions, that is one thing . . . ."

(Tr. 9/23/79 at 24-25) (emphasis added) (J.A. 474). *See* Govt. Br. at 144 n.168. We find, in short, absolutely no support for the claim that the criminal charges were either brought or prosecuted in a particular fashion in order to influence defendants to dismiss their civil suit. The government had previously acquired, as the affidavit for the search warrant fully supports, very substantial evidence of monstrous criminal offenses which no responsible United States Attorney could refuse to prosecute. The search warrants were requested to obtain corroborative evidence of crimes that were fully articulated in the supporting affidavit.

We accordingly affirm the district court's refusal to disqualify all prosecutors in the office of the United States Attorney for the District of Columbia, and reject defendants' new argument that the participation in this prosecution of prosecutors sued by Scientology for their official role in the Los Angeles searches resulted in a denial of due process. Our disposition of the search and seizure issue, *supra*, also disposes of the claim that the government or the prosecutors participated in an illegal search.

V. The Alleged Violation By The Government Of The Agreement For The Disposition Of Hubbard's Case

After long negotiations the government submitted to the defendants a proposed agreement for the disposition of the case. Under the agreement the defendants would be found guilty by the District Court on a stipulated record. Specifically, defendant Hubbard was to be found guilty on Count Twenty-three of the indictment. Paragraph 5 of the Agreement provided:

> 5. The government retains the right to allocute on matters in any fashion it chooses as to all defendants except the defendant Hubbard. As to the defendant Hubbard, the government agrees to advise the Court as follows: "the government takes no position and is making no request on the matter of sentence with respect to the defendant Hubbard." It is understood that Mrs. Hubbard through her counsel will make no statement in allocution concerning the facts of the case. It is further agreed that as to any defendant, including Mrs. Hubbard, the government may dispute any statements of fact on any matter with which it has disagreement. . . .

September 23, 1979 at 5 P.M. was set as the deadline for acceptance of the agreement by the defendants. Sub-

sequently, the government contended that the defendants had failed to accept, so the agreement did not become effective. The defendants filed a motion for an order enforcing the agreement, and requested an evidentiary hearing on the matter. The court conducted such a hearing and on October 8, 1979 granted the defendants' motion. On October 16, 1979 the government filed a motion for reconsideration of the court's order directing enforcement. The government's motion was denied.

Invoking *Santobello v. New York*, 404 U.S. 257 (1971), Hubbard now contends that by a statement in its motion for reconsideration the government violated paragraph 5 of the disposition agreement, by taking the position "that Mrs. Hubbard should receive a jail sentence, especially since she was at the head of the conspiracy." Analysis of Hubbard's complaint requires consideration of the context in which the government's statement was made.

At the hearing on the motion to enforce the disposition agreement Hubbard's counsel, Mr. Boudin, testified that the government's position was that Hubbard should not receive a jail sentence. Thus Mr. Boudin testified:

> Q Well, you did urge the court to continue the case on Friday, the 21st?
>
> A I think I have consistently urged the court to continue this case in the hope that we would achieve the result of an agreement, or to enforce an agreement which I thought we had reached.
>
> • • • •
>
> A As far as I was concerned, I, personally had only one objective: to carry out what I thought was the government's position that it did not want Mrs. Hubbard to go to jail.
>
> Q Now, Mr. Boudin—
>
> A And that is all I had personally in mind. I was not concerned about the criminal prosecution of Mrs. Hubbard elsewhere.

I was not really concerned about testimonial immunity, or the problem.

My real concern was only one thing: to make it clear to the court that the government did not want Mrs. Hubbard to go to jail.

• • • •

Q Mr. Boudin, wasn't it, in fact, the government's position that Mrs. Hubbard should go to jail, but that that would be left up to the court?

A Absolutely not. Absolutely not. The government told me in Los Angeles that it did not expect that the court would put Mrs. Hubbard in jail. That was an unequivocal statement made—

Q You are saying—

A (Continuing)—by Mr. Banoun and by Mr. Reardon.

And the government repeated in the meetings of the week of September 17th that it did not want to say explicitly that it did not want Mrs. Hubbard to go to jail, because that would be contrary to a policy position.

But that it did not expect the court to put Mrs. Hubbard in jail.

• • • •

Q Mr. Boudin, that is quite different from saying that the government stated it did not want Mrs. Hubbard to go to jail, isn't it?

A No, I think the government stated that it did not want Mrs. Hubbard to go to jail, because it recognized in Los Angeles and here one thing that was indisputable, and that I told his honor in the presence of Mr. Banoun at the bench: Namely, Mrs. Hubbard's ill health.

(Tr. 10/5/79 at 121-24) Counsel for Heldt and Snider, Mr. Hirschkop, also sounded this theme:

The government kept making it clear that they did not care to have Mrs. Hubbard incarcerated, but they did not want to make that known to the court.

• • • •

The prosecution agreed they were not anxious to see Mrs. Hubbard go to jail. That was not their position. They just didn't want to say that to the court publicly.

(Tr. 10/2/79 at 13, 20)

In his testimony at the hearing Assistant United States Attorney Banoun denied that the prosecutors had said they did not want Mrs. Hubbard to go to jail:

We indicated that we would, that our office would under no circumstance enter into any agreement which bound any court to a pre-plea agreement, that there would be no incarceration, that our office just didn't do it and we didn't believe any of the judges in this court did.

• • • •

Q Mr. Banoun, did you at any time tell Mr. Boudin that you were opposed to or did not want his client, Ms. Hubbard, to go to jail?

A Absolutely not.

Q Did you—

A To the contrary, I would say.

Q Excuse me?

A I would say that I never said that, that I told him when we were negotiating in LA it was quite possible she may not go to jail; on the other hand, it's quite possible she may.

We did not—I said we could not bind the judge in any way. It was totally up to the judge, but that we would not stand up and take a position of no jail because that would not be consistent with our theory of the case or the United States' position or the best interests of justice.

Q Did you at any time tell Mr. Boudin that you didn't expect the Court to send his client to jail?

A Absolutely not.

(Tr. 10/5/79 at 210p, 210q)

At the instance of the defendants the District Court ruled that because United States Attorney Rauh had cross examined a witness at the hearing, he would not testify concerning the government's position.

In proposed findings of fact on the motion to enforce the disposition agreement, filed on September 30, 1979, the defendants stated that during the negotiations on the agreement

> Defense counsel argued strenuously for inclusion of a statement that "the government does not seek Mrs. Hubbard's incarceration." Defense counsel pointed out that from the beginning the other defendants had expressed the willingness to sacrifice their own personal interests in return for favorable consideration for Mrs. Hubbard, and that the government's own formulation indicated a conclusion that the interests of justice did not demand the incarceration of Mrs. Hubbard. The government lawyers said that for "policy" reasons only, they were unwilling affirmatively to state the latter proposition on the record, although several of the prosecutors did feel that the interests of justice did not require Mrs. Hubbard's incarceration.

J.A. at 998.

In its motion of October 15, 1979 for reconsideration of the order enforcing the agreement the government stated:

> The defense has maintained in its motion and during the hearing that the government felt that the interests of justice did not require Mrs. Hubbard's incarceration. This is not so. Mr. Rauh would have testified that he believed that Mrs. Hubbard should receive a jail sentence, especially since she was at the head of the conspiracy. The government agreed not to allocute as to Mrs. Hubbard because this issue was holding up a possible disposition and because the government believed that the Court would recognize that Mrs. Hubbard was at the top of the conspiracy and impose the appropriate jail sentence.

J.A. at 507 (footnotes omitted). Hubbard views this statement as an improper and prejudicial attempt by the government to evade its promise to make no request with respect to a sentence in her case.

Considering the government's statement in context we think it is not susceptible of the interpretation placed upon it by Hubbard. The statement was a direct response to the testimony of Hubbard's counsel that the government "did not want Mrs. Hubbard to go to jail." That statement constituted an anticipatory allocution on behalf of Hubbard. Believing as it did that the statement was a misrepresentation of its position the government was under a duty to dispute it. In so doing the government properly availed itself of the proviso in the settlement agreement "that as to any defendant, including Mrs. Hubbard, the government may dispute any statements of fact on any matter with which it has disagreement." Had the government failed to challenge defense counsel's representation the court in passing sentence would have acted on a factual premise that in the government's view was false; and no disposition agreement could require the government to permit that to happen.

The government did not violate the disposition agreement.

VI. The Refusal to Grant Testimonial Immunity to Kember

A. *Hubbard's Motion for "Use" Immunity for Kember*

Mary Sue Hubbard, second only to her husband L. Ron Hubbard in the hierarchy of the world-wide Church of Scientology, was the first-named and principal defendant in the conspiracy count and associated offenses charged in the indictment. She held the title of "Controller" and Commodore Staff Guardian (CSG), and had duties under her husband which included supervision of the Guardian Offices. J.A. at 927. Shortly before the

scheduled trial date, she moved the court, after the government denied a similar request, for an order pursuant to 18 U.S.C. § 6002 (1970)[84] granting testimonial

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[84] The use immunity statutes provide:

§ 6002. Immunity generally

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

§ 6003. Court and grand jury proceedings

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General,

("use") immunity to Jane Kember so that Kember could offer allegedly "exculpatory" testimony in behalf of Mrs. Hubbard.

Jane Kember, the second-named defendant in the indictment, which describes her as having "the title of 'Guardian World-Wide' (GWW) and head[ing] the daily operation of all Guardian's Offices, reporting directly to L. Ron Hubbard and Mary Sue Hubbard." Indictment ¶ 5 (J.A. 109). She succeeded Mrs. Hubbard as the person responsible for the day-to-day activities and supervision of the Guardian Office. Affidavit of Stephen M. Bird at 11 (J.A. 927). Kember is one of the principal defendants in the case. At the time of Hubbard's motion Kember was a fugitive in England, where she conducted Scientology operations, and was fighting extradition to this country. Hubbard's motion sought more than mere use immunity for Kember. It requested in addition that the government permit Mrs. Kember to travel to the United States to testify in aid of Mrs. Hubbard and then allow her to return to England to continue her legal challenge to the extradition efforts of the United States.

Neither Hubbard nor Kember filed personal affidavits as is normally required. Instead Hubbard's local lawyer (Boudin) and Kember's British solicitor (Bird) filed what are essentially hearsay affidavits. The solicitor's affidavit is based on "instructions I have received from

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or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

Mrs. Kember," and relying thereon states that she would testify to certain facts in support of Hubbard that allegedly would be beneficial to Hubbard's case. Because of the disposition we make of this motion we will not deal with the procedural defects of such affidavits, but will analyze their evidentiary allegations as though the facts had been properly presented.

B. *"Use" Immunity in the Courts*

The first, and most decisive reason for affirming the refusal of the government and the court to grant Hubbard's motion for "use" immunity for Kember lies in the decisional law interpreting 18 U.S.C. §§ 6002 and 6003.

Recent cases interpret the relevant statute as not obligating the government to grant use immunity to a putative defense witness who is a principal co-defendant of the defendant who seeks the immunized testimony. While upholding the validity of the "use" immunity statute, the Supreme Court, by Justice Powell, pointed out:

> "Once a defendant demonstrates that he has testified, under a . . . grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence."

Kastigar v. United States, 406 U.S. 441, 460 (1972), *quoting Murphy v. Waterfront Commission*, 378 U.S. 52, 79 n.18 (1964). Granting "use" immunity thus increases the potential burden of proof the government must bear. If defendants could obtain testimonial immunity for other defendants to testify, it would inevitably snarl criminal proceedings. The imagination of defense counsel could run riot and, with the government being unable to control the extent of the witness'

testimony, immunity and claims of immunity for the co-defendant witness would be sprouting with every answer.

The recognized rule is that the statute does not obligate the government to grant "use" immunity to defendants' witnesses and the power to apply to the court for use immunity is confined to the government. *Grochulski v. Henderson*, 637 F.2d 50 (2d Cir. 1980), *cert. denied*, 101 S. Ct. 383 (1981); *United States v. Turkish*, 623 F.2d 769 (2d Cir. 1980), *cert. denied*, 101 S. Ct. 856 (1981); *United States v. Lenz*, 616 F.2d 960, 962-63 (6th Cir.), *cert. denied*, 447 U.S. 929 (1980); *United States v. Klauber*, 611 F.2d 512 (4th Cir. 1979), *cert. denied*, 446 U.S. 908 (1980); *United States v. Bacheler*, 611 F.2d 443 (3d Cir. 1979); *United States v. Herman*, 589 F.2d 1191 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979); *United States v. Graham*, 548 F.2d 1302, 1314 (8th Cir. 1977); *In re Kligo*, 484 F.2d 1215, 1222 (4th Cir. 1973).

Generally, a trial court has no authority, in the absence of a request by the government, to provide use immunity for a defense witness. *United States v. Herbst*, 641 F.2d 1161, 1168 (5th Cir. 1981); *United States v. Lenz*, 616 F.2d 960 (6th Cir.), *cert. denied*, 447 U.S. 929 (1980); *United States v. Gleason*, 616 F.2d 2, 27-28 (2d Cir. 1979), *cert. denied*, 444 U.S. 1082 (1980); *United States v. Niederberger*, 580 F.2d 63 (3d Cir.), *cert. denied*, 439 U.S. 980 (1978); *United States v. Morrison*, 535 F.2d 223 (3d Cir. 1976); *United States v. Berrigan*, 482 F.2d 171 (3d Cir. 1973). *Contra*, *United States v. DePalma*, 476 F.Supp. 775 (S.D.N.Y. 1979). Where the defense has been denied material testimony by prosecutorial misconduct, however, two courts have held that the trial court, in order to correct such misconduct, may order the government on remand to grant use immunity or suffer the dismissal of its case. *United States v. Herman*, 589 F.2d 491 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979); *United States v. Morrison*.

535 F.2d 223 (3d Cir. 1976); *cf. Government of the Virgin Islands v. Smith*, 615 F.2d 964 (3d Cir. 1980) (distinguishing statutory and "judicial" immunity); *see also Earl v. United States*, 361 F.2d 531, 534 n.1 (D.C. Cir. 1966), *cert. denied*, 388 U.S 921 (1967). This is not such a case.

An extensive discussion of the cases is not necessary. The Second Circuit's decision in *United States v. Turkish*, 623 F.2d 769 (2d Cir. 1980), *cert. denied*, 101 S. Ct. 856 (1981), discusses the alternatives. The defendants there moved that seventeen of the prospective defense witnesses be granted immunity and be required to testify under 18 U.S.C. § 6001. The customary argument was made by the movants that "these witnesses could provide exculpatory testimony, but would invoke their Fifth Amendment privilege and decline to testify unless compelled to do so." At the trial court's invitation the government considered the request, but decided not to grant immunity, and the validity of this decision was upheld by the trial court after the trial. Affirming that decision, the Second Circuit commented:

> [W]e think *trial judges should summarily reject claims for defense witness immunity whenever the witness for whom immunity is sought is an actual or potential target of prosecution.*[85] *No hearing should be held to establish such status.* The prosecutor need only show that the witness has been indicted

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[85] We do not believe that the Second Circuit's decision in *Turkish* should be taken as holding that the government must grant immunity in every case unless the witness is "an actual or potential target of prosecution." Such an interpretation of the statute would ignore the fact that the witness is claiming self-incrimination. That the government is not then targeting the witness does not mean he might not eventually be a target. If all untargeted witnesses were granted compulsory use immunity then they could secure immunity from some of the worst then undiscovered crimes by merely testifying in court *on a defendant's behalf.*

> or present to the court *in camera* an *ex parte* affidavit setting forth the circumstances that support the prosecutor's suspicion of the witness's criminal activity.

623 F.2d at —— (emphasis ——). The court deferred passing on factual situations where the witness is not an indicted defendant or a potential defendant or where the government prefers not to state its position. In a separate opinion, Judge Lumbard stated:

> In my view it is not the proper business of the trial judge to inquire into the propriety of the prosecution's refusal to grant use immunity to a prospective witness.

Id. at 779 (Lumbard, J., concurring in part and dissenting in part). This seems to be the soundest interpretation of the statute. We accordingly affirm the trial court's denial as a proper interpretation of the statute.

C. *The Affidavits Filed in Support of the Motion*

Even if the foregoing analysis did not persuade us that the court correctly denied Hubbard's motion, we would in any event deny the motion based on the factual insufficiency of the filed affidavits. The affidavits allege that if Kember were called as a witness for Hubbard she would claim that her testimony would incriminate her and would refuse to testify unless she were assured that her testimony could not later be used against her. Bird's affidavit for Kember further states "her testimony potentially might be *highly incriminating* to herself." J.A. at 911. Several of the significant allegations of the Bird affidavit assert that practically all the incriminating documents in the case came to Kember's knowledge and that Kember's potential testimony was "exculpatory" of Hubbard; and the affidavit is replete with assertions "that Mrs. Hubbard had *no prior knowledge*" of certain allegedly unlawful activities described in the indictment. J.A. at 935-38, 942. Hubbard's brief

also asserts that "Mrs. Kember was the *only* witness who could have given detailed and creditable testimony on . . . [certain] stated matters." Hubbard's Brief at 70 (emphasis added). The Boudin affidavit also describes defendant Kember as the "principal, and *perhaps* the only witness who can testify to certain points." J.A. at 911 (emphasis added). Hubbard's brief also states Kember would allegedly testify that Hubbard "had *no knowledge of or responsibility* for the allegedly criminal acts described in the documents which the government intended to introduce as evidence." Hubbard's Brief at p. 72.

The Boudin affidavit in support of Hubbard's motion purported to analyze the government's case and concludes that the Kember testimony would be "exculpatory." The affidavit further alleges that "Kember would [testify] that because of the extensive activities and interests of the Guardian Office, Mary Sue Hubbard could not possibly have known about, and would be prevented from knowing about, the vast majority of such [incriminating] matters." J.A. at 910. The "Red Box" program suggests otherwise.

Many of the claims in the Boudin (Hubbard) affidavit with respect to Kember's potential testimony are less than conclusive and hedge their probative effect by limiting terminology. For example: "Mrs. Hubbard has had *little* responsibility for the director [sic] or supervision of the Guardian Office . . ." "[W]ritten programs, instructions, and compliance reports . . . of the Guardian Office . . . *usually* were not authorized or seen by Mrs. Hubbard . . ." "As to ". . . communications addressed to Mrs. Hubbard . . . Mrs. Kember did not pass along *most of them.*" "Mrs. Hubbard . . . would [never] . . . have received copies of the *overwhelming majority* of the [incriminating] documents referred to in the indictment. Hubbard Brief, p. 69-70 (emphasis added). The qualified nature of such representations fails to offer sufficient support for the representation that Kem-

ber's testimony would be "exculpatory" of Hubbard's criminality.

The factual claims of Hubbard's lawyer and Kember's solicitor asserted in their affidavits in support of Hubbard's motion to grant use immunity to Kember can be summarized as follows:

(1) Kember would testify that Hubbard had "no prior knowledge" of certain of the unlawful activities—she "had no knowledge of or responsibility for the alleged criminal acts." Hubbard Brief at 72.

(2) Kember was the *only* witness in a position to offer such essential testimony. J.A. at 911.

(3) Kember would offer "essential exculpatory testimony." J.A. at 908.

As to (1) the affidavits indicate that much of the alleged beneficial testimony of Kember would not be admissible for various reasons. And even if some of the testimony was admitted, while it might give some aid to Hubbard's case, it would fall short of being substantially exculpatory. Obviously Kember was close to Hubbard in some operations and at some times, but there were huge gaps of time when they were hundreds of miles apart. Kember might be able to testify as to some documents she forwarded to Hubbard and some that she did not, but she was not a competent witness to Hubbard's complete lack of knowledge on many matters during very substantial periods covered by the indictment. The affidavits exaggerate the probative effect of the admissible evidence. In a similar case, Chief Judge Winner pointed out with respect to an allegation that a witness will testify "to what [a] defendant knew" is "not infrequently ruled [to be inadmissible because] a witness can't testify to the fact of another's state of mind, barring a possible exception where the witness is a psychiatrist." *United States v. McMichael*, 492 F.Supp. 205, 208 (D. Colo. 1980).

Another fatal weakness in the affidavits of counsel lies in the fact they do not support the allegation that Kember was the *only witness* who could allegedly testify to Hubbard's lack of knowledge. The availability of other witnesses would be one factor that could be relied on to deny a request for immunity. Some of the flaws in Kember's claim as to the probative effect of her testimony have been pointed out. In addition, if such facts did exist, better witnesses would be Scientology's employees described in the affidavits who were physically closer to Mrs. Hubbard at various times and who screened her correspondence—for example, "her personal assistant Nikki Merwin," J.A. at 929, or any one of "three assistants," J.A. at 930, or later the "two assistants" and Mrs. Hubbard's "personal communicator," J.A. at 931. These assistants at various times presented brief summaries to Mrs. Hubbard of her correspondence and Mrs. Hubbard allegedly relied upon her assistants, though even their testimony would not be complete as to her activities because "for certain periods [Mrs. Hubbard] was in different locations from her two executive assistants." J.A. at 932. The testimony of such assistants, and even of Kember's clerical assistants, would be necessary to completely cover the claim. In fact, Kember's clerical assistants who typed the letters and mailed or filed the correspondence seemingly could testify to what documents were forwarded to Hubbard. The testimony of these assistants would also carry greater credibilty than the testimony of Kember because they were not serving in policy positions with Scientology and had not been indicted. But even their testimony would not be conclusive on the issue of Hubbard's knowledge.

The factual allegations in the affidavits with respect to Kember's ability to offer exculpatory testimony for Hubbard also do not indicate that they are generally directed to the time period covered by Count 23 to which Hubbard entered a guilty plea and is the only convic-

tion before us. The time period of this count ran from June 11, 1976 to July 8, 1977. Most of the Kember (Bird) affidavit, to the extent that it is specific, is devoted to earlier periods. Kember's representations with respect to Count 23 allege:

> 54. Concerning Count 23, that Mrs. Hubbard never met Gerald Bennett Wolfe prior to the issuance of this indictment, and has not met Michael Meisner to this day; that she Mrs. Hubbard had no prior knowledge, and certainly did not agree or authorize their entry into the United States Courthouse or any other government office for the purpose of burglarizing and stealing documents; that Mrs. Hubbard was not aware of the existence of Grand Jury proceedings conducting the investigation referred to in Count 23, paragraph 3, and that consequently she entered into no agreement to violate section 18 USC 1503; and that she, Mrs. Kember, would not be suggesting in any way that Mrs. Hubbard engaged in an agreement to commit the other offences set forth in para 8, Count 23.

J.A. at 943. Several of these allegations are highly selective, and they do not negate other facts that might prove Hubbard's guilt on the conspiracy count. That Hubbard never met Wolfe before the indictment and has never met Meisner does not disprove her participation in the conspiracy. It is not necessary that all conspirators meet each other. *United States v. Hernandez*, 608 F.2d 741 (9th Cir. 1979); *United States v. Avalos*, 541 F.2d 1100 (5th Cir. 1976), *cert. denied*, 430 U.S. 970 (1977). And, to the extent that the quoted allegations might be construed as attempting completely to negate Hubbard's guilt thereon, they are highly conclusory and incomplete, in that they do not deny other facts that would incriminate her in the offenses.[86]

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[86] At the present time the claim is also belied by the facts in the stipulated record which support her conviction.

It is therefore too plain from the affidavits for further discussion that there were many people who actually handled Mrs. Hubbard's correspondence and could testify with respect to it. Some of them were far better qualified for certain periods to so testify than Kember because they actually handled the correspondence at Hubbard's elbow when Kember was miles away. They might also be able to testify to any documents that incriminated Hubbard and were destroyed pursuant to the "Red Box" program. And Kember could not testify as to knowledge Hubbard may have gained from other sources. It is thus clear that Kember was not the only witness who might testify to substantially the same facts, and that no witness could testify to the state of Hubbard's mind or as to the extent of her own knowledge except herself. The Guardian's Office was alleged to have "more than 1050 full-time staff." J.A. at 923. With such a plethora of potential witnesses it cannot be concluded that Kember is the *only* witness. The admissibility of the critical parts of Kember's testimony was thus highly questionble and there were other witnesses who were better qualified to testify to the basic facts from which such knowledge would be deduced or denied.

D. *The Effect of the Disposition Agreement*

A further consideration at this time is the fact that Hubbard and the other defendants were found by the court, on the pleading of the defendants, to have entered into a Disposition Agreement (see Appendix) which called for the court to decide the case on a "Stipulation of Evidence." J.A. at 348-61. The agreed "Disposition" essentially amounts to an admission of guilt on the "stipulated record" to one count of the indictment and limits the challenges the defendants might assert to any conviction. As set forth above, the Disposition Agreement between the parties provided, *inter alia*, that the defendants agreed "not to challenge the sufficiency of

the evidence . . . on appeal [and to refrain from] assert-[ing] that the facts alleged do not amount to a violation of the crime charged *because* of *other considerations.*" J.A. at 356-58. (emphasis ———) Hubbard's present attempt on appeal to remand the case to secure the immunized *factual testimony* of Kember, or to have the case dismissed for failure to secure such factual testimony, constitutes an attempt to introduce additional evidence in violation of this agreement. Her motion in this respect therefore would be denied on such grounds if we had not already found that it did not lie under sections 6002 and 6003, and that the factual support for it was insufficient. It is also significant that Hubbard did agree on the *facts* in the stipulated record to "be found guilty on Count twenty-three of the indictment" charging conspiracy to obstruct justice in violation of 18 U.S.C. § 1503 and several other offenses.[87]

We therefore affirm the action of the government in refusing to grant "use" immunity to Kember and the court's refusal to order such immunity. Apart from the fact that "use" immunity was not required to be granted, it would have been foolhardy to grant such immunity as it would have increased the government's burden of proof against a defendant who it appeared from the record was the highest official of Scientology with admitted guilty knowledge of the indicted crimes. The Attorney General must approve the grant, and the United States Attorney must be satisfied that the testimony is necessary to the public interest.[88] It would obviously not have been in the public interest to hazard the prosecution of Kember with all the potential objections that might evolve from granting "use" immunity to her.

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[87] Convictions were entered in accordance with the Disposition Agreement.

[88] *See* 18 U.S.C. § 6003, set forth in note 84 *supra.*

APPENDIX

DISPOSITION AGREEMENT

The Court finds that the government and the defendants in this case agreed to the following:

1. Defendants Hubbard, Heldt, Snider, Weigand, Willardson, Raymond, and Wolfe will be found guilty upon Count Twenty-three of the indictment, which charges the defendants with consipracy to obstruct justice, by the trial court upon a stipulated record;

2. Defe[n]dant Hermann will be found guilty upon Count One of the indictment, which charges the defendants with conspiracy to illegally obtain government documents, by the trial court on a stipulated record;

3. Defendant Thomas will be found guilty upon any misdemeanor theft count contained in the indictment by the trial court upon a stipulated record with the specific count chosen by the government;

4. The remaining counts in the indictment shall not be dismissed pending disposition of any appeals brought by the defendants. In the event that a conviction of a particular defendants is reversed or vacated as a result of judicial review, the government retains the option of proceeding on any of the remaining counts as to that defendant. In the event that the conviction of any defendant is not reversed, all remaining counts as to that defendant shall be dismissed with prejudice upon entry of the final judgment of conviction.[4][*] It is understood that the appellate process may include proceedings on certiorari in the United States Supreme Court;

5. The government retains the right to allocute on matters in any fashion it chooses as to all defendants

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* Since no footnotes to this Agreement appear in Judge Richey's opinion or elsewhere in the record, the court assumes that the superscript "4" here is a typographical error.

except the defendant Hubbard. As to the defendant Hubbard, the government agrees to advise the Court as follows: "the government takes no position and is making no request on the matter of sentence with respect to the defendant Hubbard." It is understood that Mrs. Hubbard through her counsel will make no statement in allocution concerning the facts of the case. It is further agreed that as to any defendant, including Mrs. Hubbard, the government may dispute any statements of fact on any matter with which it has disagreement;

6. In the event that any defendant receives a term of incarceration as a result of conviction in this case, the government will not object to his or her incarceration in a minimum security institution currently designated level one by the Bureau of Prisons.

7. Should the Bureau of Prisons or the Parole Commission request of the government its view as to the category of the severity of the offense of which the defendants have been convicted, the government will not tell these agencies that the offenses involved more than $2,000 in property value;

8. The government reserves the right to attach any or all of its designated case-in-chief documents to the stipulated record to support findings of guilt by the trial court. The defendants have agreed not to challenge the sufficiency of the evidence before the trial court or on appeal. That is, the defendants will not challenge the accuracy of the facts stipulated by the government, and the defendants will not assert that the facts alleged do not amount to a violation of the crime charged because of other considerations. The government shall oppose any attempt of the defendants to have the stipulated record sealed. With respect to all documents seized during the searches in California on July 8, 1977, the government retains the right to distribute copies of such documents to state and federal law enforcement agencies and other

agencies of the federal government. It is further agreed that these documents will not be made available by the government to the press or to any private individuals or entities except pursuant to lawful subpoena and following ten days' notice to the Church of Scientology;

10. The stipulated record upon which the defendants are to be convicted will be prepared by the government and submitted to the defense two days after the day upon which the agreement is finalized. The defense will be given twenty-four hours to comment on and propose additions to the stipulated record. The government may accept or reject the defendants' proposed changes;

11. The government has made no promises with respect to immunity from prosecution in other jurisdictions.

(J.A. 356-358).

WALD, *Circuit Judge* (Concurring in part, and concurring in the result): I concur in the result in this case, but I cannot agree with all the rhetoric in sections I and III-VI of the court's opinion. Regarding section II, which treats the search and seizure issue, I concur in the opinion, except for the court's discussion of the search of Mrs. Lawrence's office at Fifield Manor,[1] and the degree of preparation required of agents conducting complex document searches.[2] I would also clarify the application of the "scrupulous exactitude" test in this case.[3] I confine my remarks to the latter three issues.

The court properly states the law that "the authority to search granted by any warrant is limited to the specific places described in it, and does not extend to additional or different places."[4] I find, however, that Mrs. Lawrence's office was nowhere mentioned in the warrant and the searching officers could not reasonably have believed that her office constituted part of the "suite of offices of Mr. Henning Heldt[.]" J.A. at 155 (warrant's description of the place to be searched). I find appellants' arguments on this issue[5] persuasive: the Lawrence office was a separate, free standing structure, independently locked, with no external markings of any sort to indicate that it constituted part of someone else's office in the main building. It is highly significant that access to the Heldt suite of offices in the main building would not provide access to the Lawrence structure.[6] In addition, the only indication whether this structure—

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[1] *See* per curiam opinion pp. 50-56 *supra*.

[2] *See id.* at 47-50.

[3] *See id.* at n.33.

[4] *Id.* at 50.

[5] *See id.* at 50-53.

[6] *See id.* at n.50.

nowhere referred to in the warrant—was or was not part of the Heldt suite came from Mrs. Lawrence, who said it was her own office, not Mr. Heldt's, and that she did not work for him.[7] Of course, as the court says, Mrs. Lawrence "should [not] have been permitted to lay down the boundaries for the agents' search." [8] But her remarks are worthy of attention not only because they represent the only specific statement which the agents had before them to judge whether the structure was or was not part of the Heldt suite, but also because they corroborated the physical evidence indicating the separateness of the structure from the Heldt suite. For these reasons, I am convinced that entry into Mrs. Lawrence's office was outside the scope of the warrant and unlawful. I am in accord with the *per curiam* opinion, however, insofar as it concludes that even if this search of the Heldt suite were outside the warrant, the circumstances under which it was conducted do not represent such flagrant disregard for the warrant as to convert the search into a general one requiring total suppression of all documents seized.[9]

In its discussion of the preparation required of agents who undertake searches for documents, the court states that "the agents should be familiar with the general nature of the crimes that are charged and the list of items they are authorized to seize, either through reading of the warrant or through adequate instructions *or supervision* from those in charge." [10] I certainly agree that it is improper for a search of this magnitude to be undertaken unless those participating in it familiarize themselves with the list of particulars they are authorized to

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[7] *See id.* at n.52.

[8] *Id.* at 54.

[9] *See* cases cited *id.* at 43.

[10] *Id.* at 48-49 (emphasis supplied).

seize. But I am convinced that a first-hand reading of the list, or a thorough oral communication of it, constitutes the minimum preparation each agent must receive before conducting a document search of this kind. I cannot envision what sort of "supervision" the court speaks of which would suffice to familiarize agents with a list of particulars they have neither been told about nor read. I do agree, however, that "the arrival of a supplementary contingent of inadequately prepared agents in this particular case [did not result] in a general search which might require the exclusion of all seized documents." [11]

Finally, although I concur with the court's discussion of the "scrupulous exactitude" test as far as it goes,[12] I would add that the need for minimization in conducting document searches [13] is intensified where the documents are sought because of "the ideas which they contain." If the particularity requirement is not obeyed with "the most scrupulous exactitude" in such cases, "the protection of [first amendment] freedoms [might be left] to the whim of the officers charged with executing the warrant[.]" *Stanford* v. *Texas*, 379 U.S. 478, 485 (1965); *see Zurcher* v. *Stanford Daily*, 436 U.S. 547, 564 (1978). In this case it is true that most of the documents listed in the warrant were allegedly stolen: thus their content was irrelevant to the justification for their seizure. It is equally clear, however, that at least with respect to items 152-62 in the warrant, the "ideas" contained in the documents were, or may have been, the basis for their seizure, since those documents were subject to seizure only because they evinced some intent to commit conspiracies against the government, just as some

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[11] *Id.*

[12] *See id.* at n.33.

[13] *See id.* at 44-47.

documents in *Stanford* were subject to seizure only because they evinced some intent to violate the Texas Suppression Act. In both cases agents were sent to seize, *inter alia*, any documents which contained certain generally described thoughts or plans, rather than being sent to seize only specific items, e.g., a stolen television, or heroin, or a particularly described diagram, ledger, or letter. See *Stanford v. Texas*, 379 U.S. at 485 n.16. The former directives lack the inherent exactitude present in the latter, and inevitably require non-neutral officers to make important discretionary judgments as to the nature and content of various documents. Equally significant is the fact that here, as in *Stanford*, the group subjected to the search was a political or religious organization currently in conflict with the government, precisely the type of group that the first and fourth amendments most vigilantly protect. *See generally Zurcher* v. *Stanford Daily*, *supra*, 436 U.S. at 564; *NAACP* v. *Alabama*, 357 U.S. 449, 460-62 (1958). Thus, had defendants alleged that certain documents admitted as evidence against them had been unlawfully seized, the scrupulous exactitude standard might have been appropriately applied. But that is not the argument here,[14] and I agree with the court that the scrupulous exactitude standard is not appropriate for deciding whether a general search occurred requiring total suppression of everything seized.

Subject to the above, I concur in the opinion of the court concerning the search and seizure issue, and with the results reached in other sections of the opinion.

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[14] *See id.* at n.29.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-2442 September Term, 1981

United States of America Criminal No. 78-401

v.

Henning Heldt
and
Duke Snider,
Appellants ARGUED 2-27-81

NO. 79-2447

United States of America

v.

Mary Sue Hubbard,
Appellant ARGUED 2-27-81

BEFORE: MacKinnon, Robb and Wald, Circuit Judges

O R D E R

On consideration of the petition for rehearing of appellant Snider, the petition for rehearing of appellant Hubbard and of the motion of appellant Hubbard to join the petition for rehearing en banc of appellant Snider, it is

ORDERED by the Court that the motion of appellant Hubbard to join in petition is denied, and, it is

FURTHER ORDERED by the Court that the aforesaid petitions for rehearing are denied.

Per Curiam

FOR THE COURT:

George A. Fisher
Clerk

BY: Robert Bonner [signed]
Robert A. Bonner
Chief Deputy Clerk

UNITED STATES of America

v.

Mary Sue HUBBARD et al.

Crim. No. 78-0401.

United States District Court,
District of Columbia.

Sept. 13, 1979

MEMORANDUM OPINION

CHARLES R. RICHEY, District Judge.

The fourth amendment of the U.S. Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S.Const. Am. 4. This amendment was intended to prevent searches under unchecked general authority, such as those that had resulted from the use of the general warrant in England and the writs of assistance in the

Colonies, and to ensure the "privacies of life". Boyd v. United States, 116 U.S. 616, 630, S.Ct. 524, 29 L.Ed. 746 (1886). See Stanford v. Texas, 379, U.S. 476, 481-85, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965); Frank v. Maryland, 359 U.S. 360, 363-65, 79 S.Ct. 804, 3 L.Ed.2d 877 (1959).

The exclusionary rule is a judicially created means of effectuating fourth amendment rights. Stone v. Powell, 428 U.S. 465, 482, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). In Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914), the Supreme Court held that a defendant could petition prior to trial for return of illegally seized evidence, and in Gouled v. United States, 255 U.S. 298, 41 S.Ct. 261, 65 L.Ed. 647 (1921), the Court held that such evidence could not be introduced in a federal prosecution. Although the exclusion of probative reliable evidence denigrates the public interest in the determination of

the truth at trial, the exclusionary rule has evolved as one deterrent to police misconduct. Stone v. Powell, 428 U.S. 465, 487-88, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). 1/

1/ Where the deterrent effect is outweighed by the public interest in the integrity of the truth-finding process the Supreme Court has abolished or refused to extend the exclusionary rule. See Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976) (where state has provided full and fair litigation of fourth amendment claim, state prisoner could not be granted habeas corpus relief on grounds that evidence obtained through unconstitutional search and seizure was introduced at trial); United States v. Calandra, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974) (refusal to extend the exclusionary rule to grand jury proceedings); Walder v. United States, 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503 (1954) (government permitted to use unlawfully seized evidence to impeach a defendant who testified broadly at trial).

Of course, other remedies, such as civil damage suits, are available for fourth amendment violations by federal officers. See Bivens v. Six Unknown Named Agents, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

Before the Court at this time are the motions of the defendants to suppress evidence. Finding no illegality in the actions of the government agents who executed the warrants at issue, the Court will deny the motions, and order the defendants to proceed to trial to be "acquitted or convicted on the basis of all the evidence which exposes the truth." Alderman v. United States, 394 U.S. 165, 175, 89 S.Ct. 961, 967, 22 L.Ed. 2d 176 (1969).

I. PROCEDURAL HISTORY

On July 8, 1977, three search warrants were simultaneously executed on premises owned and operated by the Church[2/] of Scientology: 2125

2/ The Court will assume for the purposes of this action that the Church of Scientology is a bona fide religious organization.

S. Street, N.W., Washington, D.C.; 5930 West Franklin Avenue, Hollywood, California [the Fifield Manor]; and 4833 Fountain Avenue, Hollywood, California [the Cedars-Sinai Complex]. Immediately following the execution of the warrants, the Church filed two separate actions in Los Angeles and the District of Columbia seeking the return and suppression of property pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure. 3/

3/ Rule 41(e) of the Federal Rules of Criminal Procedure provides:

> A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on

Fn. cont'd.

On July 27, 1977, Chief Judge Bryant of this Court ruled that the warrant executed in the District of Columbia was invalid on its face. In re: Search Warrant Dated July 4, 1977, 436 F.Supp. 689 (D.D.C. 1977). On December 1, 1977, the United States Court of Appeals for the District of Columbia Circuit reversed Judge Bryant's decision and upheld the validity of the District of Columbia search warrant. In re: Search Warrant Dated July 4, 1977, 187 U.S. App. D.C. 297, 572 F.2d 321 (D.C.Cir. 1977), cert. denied, Founding Church of Scientology v. U.S., 435 U.S. 925, 98 S.Ct. 1491, 55 L.Ed.2d 519 (1978).

3/ cont'd.
for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

In separate Memorandum Opinions of April 4, 1978, and July 5, 1978, Judge Lucas upheld the execution of the warrants in California on all grounds. Church of Scientology v. United States, No. CV-77-2565-MML (C.D.Cal. April 4, 1978); Church of Scientology v. United States, No. CV-77-2565 MML (C.D.Cal. July 5, 1978). On February 22, 1979, the Ninth Circuit Court of Appeals dismissed the Church's appeal of Judge Lucas' decision on the ground that the judgment was interlocutory and unappealable. Church of Scientology v. United States, 591 F.2d 533 (9th Cir. 1979).

Meanwhile, on August 15, 1978, eleven individuals were indicted by a federal Grand Jury.[4/] It is these individuals,[5/] about to

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4/ For background as to the nature of the charges see the Court's Memorandum Opinion of April 25, 1979. United States v. Hubbard, 474 F.Supp. 64 (D.D.C. 1979).

5/ Only nine of the defendants are before

Fn. cont'd.

go on trial, who are before this Court seeking to suppress the evidence seized on July 8, 1977. The suppression hearing began on July 3, 1979, with this Judge taking testimony in Los Angeles, California,[6] and ended, following a view of the premises and several weeks of proceedings in Washington, D.C., on August 29, 1979.

Five days prior to the completion of the hearing on the defendants' motions to suppress, Chief Judge Bryant issued an eleven-page Memorandum and Order holding that the search conducted in Washington, D.C. violated the fourth amendment. In re: Search Warrant

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5/ cont'd.
the Court. Two are awaiting extradition proceedings in Great Britain.

6/ The defendants consented to the taking of testimony outside the jurisdiction for use in the suppression hearing for the convenience of the witnesses. Trans. of July 4, 1979, at 5-17.

Dated July 4, 1977, Misc. No. 77-0151 (D.D.C. August 24, 1979).[7] It has been the government's position throughout the litigation before this Court, that none of the documents seized at the District of Columbia location were shown to the Grand Jury which indicted the defendants, and that none would be used at the trial in this case. Thus, the propriety of the District of Columbia search is not an issue before this Court.[8] Accordingly, before this Court is the motion, filed

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7/ On August 27, 1979, the Court withdrew the last three pages of its Memorandum and Order and substituted three new pages. In re Search Warrant Dated July 4, 1977, Misc. No. 77-0151 (D.D.C. August 27, 1979). The substance of the Court's ruling was not affected.

8/ The defendants also moved for the suppression of evidence seized by the United States Customs Service on July 3, 1976. After assurances from the government that none of the evidence seized in that search will play any role in the prosecution of this case, the defendants abandoned that

Fn. cont'd.

by the nine individuals about to go on trial, to suppress the evidence seized on July 8, 1977, from the two Church of Scientology premises in Los Angeles, California.

The defendants have raised six broad grounds in support of their motion to suppress:

1. The warrant was unconstitutional on its face because it is not supported by probable cause, was based upon stale information, did not particularly describe the place to be searched and the items to be seized, and was a general warrant;

2. The search was illegal because the affidavit which was necessary to uphold the

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8/ cont'd.
motion. Trans. of August 29, 1979, at 410. The government's concession was not made from a position of weakness: In Church of Scientology v. Simon, 460 F.Supp. 56 (C.D. Cal. 1978), aff'd, 441 U.S. 938, 99 S.Ct. 2153, 60 L.Ed.2d 1040 (1979) the challenged search was upheld.

legality of the warrant was not attached to the warrant at the time it was executed;

3. The agents conducted a general exploratory search, in violation of the terms of the warrant and of the first and fourth amendments;

4. The agents seized documents beyond the scope of the warrant;

5. The agents used excessive force in their searches in violation of 18 U.S.C. §3109; and,

6. The warrant was obtained and executed by the government in a manner which violated defendants' right to process of law.

The government has convincingly undermined the persuasiveness of the defendants' arguments on three broad grounds. First, the government contends that the standing of the defendants to seek the suppression of evidence seized from the premises of the Church is severely limited. Second, the government points to the decision of the

U.S. Court of Appeals for the District of Columbia upholding the facial validity of the search warrant, In re: Search Warrant Dated July 4, 1977, supra, and the decisions of Judge Lucas upholding its execution in Los Angeles. Church of Scientology v. United States, supra. Finally, the government seeks to narrow the inquiry to the documents the government intends to introduce into evidence as part of its case-in-chief, which the defendants virtually concede were properly seized. The Court will begin its inquiry with an analysis of the defendants' right to challenge the search of the Church's premises.

II. THE DEFENDANTS' FOURTH AMENDMENT RIGHTS ARE LIMITED TO THEIR OWN OFFICES.

Traditionally, it was necessary for a defendant to demonstrate "standing" before he or she could challenge the validity of

a search. See Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960). In Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978), the Supreme Court subsumed the traditional standing inquiry under substantive fourth amendment doctrine. Id. 99 S.Ct. at 428. Thus, defendants can have illegally seized evidence suppressed if their fourth amendment rights have been infringed. Id.

In the prior proceedings at which the searches were challenged, the searches plainly involved the plaintiff's fourth amendment rights: the Church of Scientology was the owner and operator of the premises and the party challenging the searches. In the proceedings before the Court, the parties challenging the searches are individuals.

Each individual defendant in a criminal case must demonstrate that his or her fourth

amendment rights are involved in order to suppress evidence. In Alderman v. United States, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969), the Supreme Court noted that:

> The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those aggrieved solely by the introduction of damaging evidence. Coconspirators and codefendants have been accorded no special standing.

Id. at 171-72, 89 S.Ct. at 965.

An individual's fourth amendment rights are involved if he or she has "a legitimate expectation of privacy in the invaded place." Rakas v. Illinois, supra, 99 S.Ct. at 430. It has been recognized that such a test does not provide a "bright line" between cases, but instead, each case must be determined on the facts and circumstances presented. Id. at 435 (Powell, J.,

concurring). Accordingly, with respect to each defendant, the Court must make a determination, on the facts and circumstances presented by that defendant, whether they had a legitimate expectation of privacy in the area from which evidence was seized.

In the Fifield Manor, evidence was seized from the offices of the defendants Duke Snider and Henning Heldt. In the Cedars-Sinai Complex, the only defendants' offices from which evidence was seized were those of Cindy Raymond and Greg Willardson. The government concedes that Heldt, Snider, Raymond, and Willardson have standing to suppress evidence seized from their own offices.

The defendants contend that every defendant has a legitimate expectation of privacy with respect to both premises in their entirety. In support of this claim, the defendants rely on three independent

sources. First, the defendants argue that the places from which the documents were seized were secure offices with limited access. Second, the defendants contend that the documents were purportedly either authored or received by the defendants. Third, the defendants claim that they have an expectation of privacy in the exercise of their first amendment right to association and free exercise of religion.

[1] The Court finds that there is a legitimate expectation of privacy with respect to one's own office. In Mancusi v. De Forte, 392 U.S. 364, 88 S.Ct. 2120, 20 L. Ed.2d 1154 (1968), union records were seized from an office shared by the defendant and several other union officials. Id. at 365, 88 S.Ct. 2120. The parties in Mancusi stipulated that the defendant spent a considerable amount of time in the office,

and that he had custody of the papers at the moment of the seizure. Id. at 368-69, 88 S. Ct. 2120. Accordingly, if documents were illegally seized from an office of one of the defendants, that defendant could prevent the introduction of that evidence to prove his or her guilt.

[2] Another of the defendants has attempted to fit within the rule of the Mancusi case. The defendant Mary Sue Hubbard has sought to suppress evidence seized from the office of Janet Lawrence because Hubbard is Lawrence's supervisor. The evidence before the Court shows that Hubbard did not even have a key to this office, trans. of August 29, 1979, at 329, and there is no evidence that she ever set foot in it. Accordingly, the Court finds that the defendant Hubbard has no legitimate expectation of privacy in documents located in the office

of her assistant.

[3] The defendants' second ground is completely unconvincing. According to the defendants, merely because they purportedly authored or were to receive certain letters, they have a legitimate expectation of privacy with respect to the contents of such letters. First, the defendants cannot rely on the government's "purported" allegations or the indictment, but have the burden of asserting a property or possessory interest in the seized property. Rakas v. Illinois, 99 S.Ct. 421, 423 n.1 (1978).[9/]

9/ In Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968), the Court held that testimony given by a defendant in order to establish his standing to object to illegally seized evidence may not be used against him at his trial on the question of guilt or innocence.

Having failed to do so, they have failed to meet their burden. Second, even assuming the defendants had established that they received the letters would not decide the issue. The legitimate expectations of privacy of a party who has received letters is obviously affected by what happens to the letters after their arrival. If the letters are kept in the office of the addressee, the addressee would have standing under the rule of the Mancusi case. However, if the letters are forwarded to a central filing system, and access to such system is available to numerous third parties, the expectations of privacy would be seriously undermined. Finally, the Court is unable to understand how sending letters to a third party would form a basis for a legitimate expectation of privacy after

their delivery.[10] The reasonableness of one's privacy expectations would certainly be undermined by the act of relinquishing control. See United States v. Miller, 425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976).

[4] The defendants' final contention is the vague and general argument that they had an expectation of privacy in the exercise of their first amendment right to association and free exercise of religion. In effect, the defendants seek to raise the rights of third parties simply because they share membership in a religious organization. In Rakas, the Supreme Court explicitly and emphatically declared that fourth amend-

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10/ Of course, had the letter been seized while in the custody of the U.S. Post Office a different issue would be raised. See Birnbaum v. United States, 436 F.Supp. 965 (E.D.N.Y.1977).

ment rights are personal and cannot be raised vicariously. See Rakas v. Illinois, 99 S.Ct. 421, 425 (1978). Mere membership in a religious organization would not result in the "[l]egitimation of expectations of privacy . . . by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." Id. at 430 n. 12. For example, there is no evidence that the defendant Wolfe ever set foot in any of the Church's offices in California, and no evidence that he was even aware of the existence of the documents seized on July 8, 1977. The Court is unable to fathom how he could have any expectation of privacy with respect to documents and premises merely because of his membership in the Church. Being an official of the Church would not

alter this analysis. The defendants seek a significant broadening of the right to suppress evidence. This attempt must be rejected. The Court is unconvinced that such an enlargement in the class of those who can invoke the exclusionary rule would benefit the effectuation of fourth amendment goals. See Rakas v. Illinois, 99 S.Ct. 421, 427 (1978). Accordingly, only the defendants Heldt, Snider, Willardson, and Raymond have fourth amendment rights touched by the searches of July 8, 1977, and their rights are limited to evidence seized from their offices which is being introduced against them.

III. THE WARRANTS ARE FACIALLY VALID.

Each warrant at issue in this case included a description of the premises, a description of property to be seized with

162 items, a source of documents indicating the source of the first 147 items to be seized, and an affidavit in support of the search warrant. The defendants contend that the information relied on by the affiant is unreliable, and the warrants were not supported by probable cause, do not particularly describe the places or things to be seized, and are based on stale information.

Each of the warrants executed on July 8, 1977, was supported by the same thirty-five page affidavit in support of the search warrant. The affidavits are identical except that typographical errors in the District of Columbia affidavit were corrected in the Los Angeles affidavits, and two additional footnotes were added to the two Los Angeles affidavits. The Court's analysis of the defendants' challenge to the Los Angeles warrants is greatly aided by the

decision of the United States Court of Appeals for the District of Columbia Circuit, which reversed Chief Judge Bryant's earlier ruling and upheld the facial validity of the D.C. warrant. In re Search Warrant Dated July 4, 1977, 187 U.S.App.D.C. 297, 572 F.2d 321 (D.C.Cir. 1977), cert. denied, 435 U.S. 925, 98 S.Ct. 1491, 55 L.Ed.2d 519 (1978). Of course, such a ruling is controlling precedent.

The affidavit in support of the search warrants details the series of events which led up to the request by the government to search the premises of the Church of Scientology. The following are allegations made in the affidavit:

Michael Meisner and Gerald Wolfe were caught in areas off-limits to the public in the United States Courthouse in the District of Columbia in the spring of

1976. Affidavit in Support of Search Warrant [Aff.] at 15. Both gave phoney names and presented fraudulent Internal Revenue Service [IRS] identification. Id. Wolfe pleaded guilty to the false use of a government seal, 18 U.S.C. §1017, and a warrant was issued for Meisner's arrest. Id. at 102. On June 20, 1977, an Assistant United States Attorney received a telephone call and an offer to cooperate from Michael Meisner. Id. at 2. Meisner was interrogated in the presence of the affiant over a two-week period at which he described numerous criminal acts committed by himself and others on behalf of the Church of Scientology. Id. At seventeen places in the affidavit, the information provided by Meisner was independently verified by the government. Id. 2 n.1, 3 n.2, 5 n.4, 6 n.6, 7 n.7, 9 n.10, 11

n.11, 13 n.12 & 13, 14 n.14 & 15, 16 n.16, 19 n.17, 20 n.18, 27 n.21. Meisner was a high official of the Guardian's Office, the office in the Church responsible for the "protection" of Scientology. Id. at 3-4. One of the five Bureaus of the Guardian's Office was the Information Bureau which was responsible for illegal operations to acquire government documents critical of Scientology, covert operations to discredit and remove from positions of power all persons whom the Church considers to be its enemies, and internal security within the Church. Id. at 3. Meisner was Assistant Guardian for Information for the District of Columbia, id. at 4, and later National Secretary in Los Angeles, id. at 21, and as such had access to the most sensitive Church documents, including those kept in the Church's Los

Angeles offices. Id. at 4. No immunity was offered Meisner for his testimony. Id. at 21 n.20.

The affidavit goes on to detail the conspiracies tc steal government property and to obstruct justice. Beginning in early 1974, Guardian World Wide Jane Kember issued Guardian Order [GO] 1361, which called for an all-out attack on the IRS including infiltration of the offices of the IRS by agents of the Church. Id. at 4-5. Cindy Raymond, a member of the staff of the Deputy Guardian for Information, Mitchell Hermann, who was then responsible for covert activities in the District of Columbia, and Meisner recruited Gerald Wolfe for the purpose of infiltrating the IRS. Id. at 5. However, their plans were thwarted by Wolfe's inability to obtain all of the documents desired by

his superiors. Id. at 5. In order to complete their plans covert entries were made by Meisner, Hermann, or Wolfe into IRS and Justice Department buildings on numerous occasions. Id. at 5-7. Furthermore, an electronic listening device was placed in an office which was used for high-level IRS meetings. Id. at 5 n.4.

In December, 1975, Cindy Raymond developed a "program" calling for covert operations designed to obtain Interpol documents regarding the Church of Scientology contained in files held by government agencies. Id. at 7-8. This program was developed in response to the general directive contained in GO 1634 which sought to obtain all documents that were not disclosed pursuant to the Freedom of Information Act, 5 U.S.C. §552. Id. at 8. According to this program agents were

to be placed in government offices, and thefts were to be made. Id.

Pursuant to these programs and orders, offices of the Department of Justice, the United States Attorney for the District of Columbia, and the IRS were entered on numerous occasions by Wolfe and Meisner. Id. at 5-9. Furthermore, Sharon Thomas, a member of the Church, was placed in a secretarial position within the Justice Department in order to assist in these thefts. Id. at 8-9.

When documents were obtained from certain of these incursions, Meisner sent copies to the Los Angeles Guardian's Office officials, including Henning Heldt, and Richard Weigand. Id. at 6. These were marked "Confidential GO 1361 Material". Id. Other documents obtained illegally were sent by Meisner or Hermann

to their superiors with cover memos explainint their contents signed "Mike" or "Mitch". Id. at 12, 22.

After Meisner and Wolfe were confronted in the Courthouse, the obstruction-of-justice conspiracy began. Id. at 15. Plans were made to limit the government's inquiry into the entry. Id. at 16-17. Included in this cover-up plan was the concoction of a false story Wolfe would present to the grand jury. Id. at 19-20. Eventually, Meisner became dissatisfied with his treatment at the hands of the Church officials, escaped from the guard placed on him by the Church, and agreed to cooperate in the ongoing government investigation. Id. at 21.

Meisner also provided the affiant with detailed information on the filing system of the Church. Id. at 22. The

primary depository for documents was the Information Bureau in Los Angeles. Id. Documents obtained through legitimate channels were marked "FOI" and those obtained through burglary or theft were marked "Non-FOI". Nowhere in the affidavit does it state, or even suggest, that these filing cabinets were the only places where documents named in the warrant could be found.

The files and their locations are described in some detail. Id. at 23-24. The Information Bureau documents were divided into six file systems. Id. at 23. The main Information Bureau files were made up of two file systems - individual and group - totaling 250 file cabinets. Id. The government special bank contained government documents, the majority of which were "Non-FOI" in ten

filing cabinets of four or five drawers each. Id. The individual, group and government special bank files were located in the Information Bureau's Offices in Cedars. Id. at 28. The program files were located in the Heldt suite. Id. at 30. The operations files were kept in the offices of the National Operations Officer, id. at 23, which was in Cedars. Id. at 29. The confidential file of the Deputy Guardian for Information (U. S.) was kept in the safe and a file cabinet in the office of the Deputy Guardian for Information, Greg Willardson, at Cedars. Id. at 24.

A. The Warrants Are Supported By Probable Cause.

[5] The defendants' first contention is that the warrants lack probable cause because the informant was unreliable. Meisner gave information in

direct conflict with his penal interest, without any promises by the government, and his information was independently corroborated in numerous respects. As a former official of the Church, Meisner had direct knowledge of the operations of the Information Bureau and the location of its offices and files. The affidavit showed that the information was sufficiently reliable.

[6] The defendants' second contention is that the 162 items in the "Description of Property", which is attached to the warrants, are not supported by probable cause. Items 1-99 are described in the source of documents as those taken from the office of an Assistant United States Attorney in Washington, D.C., and a footnote to the affidavit indicates that Meisner reviewed this Assistant's files

and identified the documents in items 1-99 as those taken. Id. at 13 n.*. The affidavit further states that Meisner sent copies of these documents to his superiors in Los Angeles. Id. at 12.

Items 100-148 are documents taken by Sharon Thomas from the office of a Department of Justice attorney and were identified as such by Meisner. Id. at 9 n.10. Furthermore, the affidavit indicates that copies were sent by Meisner to his superiors in Los Angeles. Id. at 6.

Items 149-151 concern synopses of Wolfe's grand jury testimony, notes by Weigand relating to the Wolfe and Meisner illegal entry into the Courthouse, and reports by Meisner about their entry. The affidavit indicates that these materials were prepared in order to cover up the Church's role in the break-in, and were delivered

to Weigand, who took them to Heldt. Id. at 17.

Item 152 called for the seizure of Guardian Order 1361 which called for the infiltration of the IRS by agents of the Church, and the affidavit indicated that such Guardian Order could be located in the Information Bureau's files. Id. at 4.

Item 158 is all documents of the IRS which relate to the Church marked "Confidential GO 1361 Material." The affidavit made clear that such material was obtained as a result of the burglaries of the IRS offices, and was sent to and seen at the Information Bureau in Los Angeles. Id. at 6.

Items 153 and 154 concern Guardian Order 1634 and all Guardian Orders issued pursuant to Guardian Order 1634

which would be identified as Guardian Order 1634-(number). The affidavit indicates that these orders related to the obtaining of government documents which the government refused to release under the FOIA. Id. at 7-8.

Items 155 and 156 called for the seizure of all Guardian Orders identified as "Snow White" and those issued pursuant to "Snow White," which would be identified by the mention of "Snow White." The affidavit indicates that this program was directed against the government. Id. at 24. Furthermore, the Court of Appeals expressly found probable cause for the seizure of such items. In re: Search Warrant Dated July 4, 1977, supra 187 U.S.App.D.C. at 303, 572 F.2d at 327.

Item 157 is all documents in the Operations files concerning Robert Snyder.

The affidavit indicates that illegal operations were directed against this individual who is identified as a newscaster critical of the Church. Aff. at 10.

Items 159 and 160 call for the seizure of all documents attached to a memorandum from Hermann or Meisner signed "Mitch" or "Mike." The affidavit establishes that such memoranda were sent to officials of the Guardians Office with stolen government documents attached. Id. at 9, 12.

Item 161 concerns all documents marked Non-FOI. The affidavit indicates that such documents are the result of burglary and theft. Id. at 22.

Finally, item 162 calls for the seizure of "any and all fruits, instrumentalities, and evidence (at this time unknown) of the crimes of conspiracy, obstruction of justice and theft of government property

in violation of 18 U.S.Code §§371, 1503 and 641 which facts recited in the accompanying affidavit make out." The Court of Appeals expressly upheld the validity of this clause under the authority of Andresen v. Maryland, 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976). In re: Search Warrant ated July 4, 1977, supra 187 U.S.App.D.C. at 303-304, 572 F.2d at 327-28.

The defendants also contend that the warrants lacked probable cause because the information in the affidavit was stale. With respect to both Los Angeles locations, the affidavit indicates that Meisner was a trusted member of the Information Bureau; that he was told by other Information Bureau officials where files were located; that such documents were kept as a part of the Church's

desire to maintain a permanent history for the Church; that such documents were essential to the operations of the Information Bureau; and that he personally watched many Information Bureau officials locate and retrieve files. Meisner confirmed his information merely twenty-eight days before the search warrants were approved by the magistrate. Aff. at 28-29. Plainly, the information was not stale. Moreover, where documents are concerned, the doctrine of staleness has a limited role. Unlike consumable or disposable items it is reasonable to expect that documents will be maintained. See Andresen v. Maryland, 427 U.S. 463, 478-79, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976).

Finally, the defendants contend that the warrant failed to indicate where

documents were to be seized. The warrant for the Cedars-Sinai Complex specified the Information Bureau where most of the files and offices were located. The warrant for Fifield Manor specified the sixth-floor suite of Henning Heldt where copies of the program files were located and numerous documents were sent. Aff. at 7 n.7, 17, 18, 29-30. Furthermore, both warrants gave general directions as to where the offices would be located based on information from the informant.

Accordingly, the Court finds that the government submitted to the magistrate extremely detailed and elaborate support for the search warrants in this case, and such support was sufficient as a matter of law.

IV. THE AFFIDAVIT WAS AVAILABLE TO THE SEARCHING AGENTS AND TO OFFICIALS OF THE CHURCH

[7] The defendants contend that the searches were invalid because the affidavit in support of the warrant was "unavailable for guidance for the executing agents . . ." Motion to Suppress at 57 (January 15, 1979). The defendants' contention is unsupported by the evidence. No less than fourteen witnesses before the Court directly disputed the defendants' claim.[13/] Affidavits

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13/ Trans. of August 16, 1979 at 122 (Agent Breen: affidavit on table in room); Trans. of August 16, 1979 at 288 (Agent Oppy: affidavit available on scene); Trans. of August 17, 1979 at 214 (Agent Benavidez: had copy of affidavit with him); Trans. of August 20, 1979 at 101 (Agent Aldridge: copy available to him); Trans. of August 21, 1979 at 20 (Agent Linker: affidavit available in room); Trans. of August 22, 1979 at 55 (Agent Esparza: team leaders throughout area with search warrants and affidavits); Trans. of August 24, 1979 at 42 (Agent Calley: had copy of warrant and affidavit

Fn. cont'd.

were available for the searching agents.

[8] The defendants also contend that the searches were illegal because the Church officials were served with only the warrant and not the affidavit. Evidence at the hearing indicated that Church representatives were told that the Magistrate had placed the affidavit

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13/ cont'd.

and each team leader had copies available for agents to read); Trans. of August 24, 1979 at 148 (Agent Maryman: team leader had warrants and affidavit); Trans. of August 28, 1979 at 102-03 (Agent Mislock: had copy of affidavit, many agents had copies); Trans. of August 28, 1979 at 210 (former Agent Bauer: searching agents were consulting others with warrant and affidavit; Trans. of August 28, 1979 at 259 (Agent Brunson: had own copy of affidavit); Trans. of July 20, 1979 at 6002 (Agent Cleary): Agent Stovall had affidavit and his was available for use by others; Trans. of July 21, 1979 at 6257 (Agent Boone: affidavit right there); and Trans. of July 18, 1979 at 5494 (Agent Stovall: had copy of affidavit).

under seal. Trans. of July 9, 1979 at 217 (testimony of Barry Weissman). Furthermore, representatives of the Church obtained copies of the affidavit at the Courthouse by 10 A.M. on the morning of the search. Trans. of July 11, 1979 at 214 (testimony of Luther Shaffer). Moreover, failure to serve even the warrant is merely a ministerial violation of Rule 41(d) of the Federal Rules of Criminal Procedure and would not render the search fatally defective. See United States v. Klapholz, 17 F.R.D. 18 (D.C.N.Y. 1955), aff'd, 230 F.2d 494 (2d Cir. 1956), cert. denied, 351 U.S. 924, 76 S.Ct. 781, 100 L.Ed. 1454 (1956). Accordingly, the searches are not in violation of law on the ground that the affidavit was not served along with the warrant.

V. THE AGENTS DID NOT USE EXCESSIVE FORCE IN THE COURSE OF THE SEARCHES

[9] Section 3109 of 18 U.S.C. provides:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

A. The Cedars-Sinai Complex.

At the Cedars-Sinai Complex FBI agents appeared at the main gate at 6:00 A.M. and the yard was empty. Trans. of August 23, 1979 at 164. The agents rang the buzzer and the night caretaker came outside. Id. The agent in charge announced that it was the FBI and they had a warrant to serve. Id. The caretaker

hesitated and the FBI cut the bolt. Id. The agents proceeded inside to the double doors to what ultimately proved to be the Information Bureau which was locked. Id. at 166. The buzzer to those doors was pressed and a man from inside opened those doors. Id. For the next two hours, the agents tried in vain to have keys supplied to the inner offices. Trans. of July 10, 1979 at 57-62 (testimony of Patricia MacDonald). Initially, a deadline of 7:00 A.M. was set. This deadline was extended to 8:00 A.M. before the forcible entry into the Information Bureau was made. Id. at 37, 57-62; Trans. of August 27, 1979 at 235-37.

In the Action Bureau, Church representatives were given until 7:00 A.M. to obtain keys, and all but one door was opened with keys provided by a Church member.

Trans. of August 27, 1979 at 93-94.

Finally, in the basement, the agents waited until 8:00 A.M. for keys and then snapped about eight padlocks. Trans. of August 27, 1979 at 104.

B. The Fifield Manor.

Meanwhile at the Manor, the agents arrived at 6:00 A.M., entered the lobby area, identified themselves, and announced their purpose. Trans. of July 20, 1979 at 6002-03. Trans. of July 5, 1979 at 228-29 (testimony of Peter Mead). The agents took the elevator directly to the sixth floor and were confronted by "accordion bars" preventing their exit into the sixth floor. Trans. of July 20, 1979 at 6004. The agents announced their presence, tried to open the gate, and waited one minute and fifteen seconds before cutting the padlock. Id. at

6004-05. About six minutes from the time of entry, after an attempt to obtain keys failed, the outer door to the office of Henning Heldt was forcibly opened. Id. at 6006-07; Trans. of July 6, 1979 at 62 (testimony of Christopher Ward). From about the time of their entry to the sixth floor, an alarm was sounding. Trans. of July 6, 1979 at 61 (testimony of Christopher Ward).

The refusal of admittance required by section 3109 need not be explicit. United States v. Allende, 486 F.2d 1351, 1353 9th Cir.), cert. denied, 416 U.S. 958, 94 S.Ct. 1973, 40 L.Ed.2d 308 (1973). There is no set time an agent must wait for a response, but such time must depend on the circumstances of the case. United States v. Phelps, 490 F.2d 644, 647 (9th Cir.), cert. denied, 419 U.S. 836, 95

S.Ct. 64, 42 L.Ed.2d 63 (1974); United States v. Allende, supra at 1353. The nature of an exigency is one circumstance which is to be considered in determining compliance with the statute. United States v. Agrusa, 541 F.2d 690, 701 (8th Cir.) cert. denied, 429 U.S. 1045 97 S.Ct. 751, 50 L.Ed.2d 759 (1976). Where sounds indicating the possible destruction of evidence are heard, the statute need not be complied with. United States v. Guidry, 534 F.2d 1220, 1223 (6th Cir. 1976); United States v. Manning, 448 F.2d 992, 1001-02 (2d Cir.), (en banc), cert. denied, 404 U.S. 995, 92 S.Ct. 541, 30 L.Ed.2d 548 (1971). Essentially the test, under both the statute and the fourth amendment, is one of reasonableness - as to both the entry itself and the scope of the force exercised in order to complete

that entry. See United States v. Murrie, 534 F.2d 695, 698 (6th Cir. 1976); United States v. Fernandez, 430 F.Supp. 794, 800 (N.D. Cal.1976).

Applying the law to the facts of this case, the Court finds that the agents complied with the requirements of section 3109. In the Cedars-Sinai Complex, the front gate bolt was not clipped until the night caretaker hesitated in his progress towards opening the gate. Based upon the nature of the charges in the warrant and affidavit and the sophistication of the organization shown in these same documents, it was reasonable for the agents to fear that an alarm could have been or was about to be set off which would trigger the destruction of evidence. After the initial entry, the agents illustrated remarkable patience, as all of the other

locks and doors in the Cedars-Sinai Complex remained intact for at least an hour. Forcible entry was not made until Church representatives refused to permit entry.

In the Fifield Manor, the time prior to entry was considerably less. However, the agents had more concrete evidence that a system signaling the destruction of evidence may have been activated: an alarm sounded upon their entry to the sixth floor. Under such exigent circumstances, even silence can be taken as a refusal to permit entry. In this case, however, there was more. The representatives on the scene had already indicated to the agents that they did not have keys. Therefore, the explicit requirements of the statute were met. Under the circumstances of this case, their actions were entirely reasonable.

The Court finds that the agents used reasonable force in opening doors and locks. Minimization was attempted: the use of electric drills was attempted instead of sledgehammers, but the drill bits snapped. Trans. of August 23, 1979 at 37, 53.

The Court finds that the agents conducting the searches in California complied with section 3109 and the fourth amendment. The behavior of the agents was eminently reasonable with respect to the timing and scope of their forcible entries - including outside doors, inside doors, filing cabinets, and desks. No excessive damage was inflicted.

VI. CHURCH PERSONNEL WERE ALLOWED TO OBSERVE THE SEARCH

[10] Rule 41(d) of the Federal Rules

of Criminal Procedure requires that an inventory of the seized property be made in the presence of applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person. At the Fifield Manor location, representatives of the Church were allowed to observe the agents searching and making the inventory. Trans. of July 6, 1979 at 323-24 (testimony of Craig Jensen); Trans. of July 7, 1979 at 196, 202, 204-08, 224-26 (testimony of Norman Taylor). In the Cedars-Sinai Complex, representatives of the Church were allowed to move freely throughout the complex prior to 9:00 A.M. Trans. of July 13, 1979 at 119 (testimony of Heber Jentzsch); Trans.

of July 12, 1979 at 23 (testimony of Janet Miller); Trans. of July 12, 1979 at 157/B (testimony of David Butterworth). In the Information Bureau, from 9:00 A.M. until the afternoon representatives were excluded. Trans. of July 11, 1979 at 203 (testimony of Luther Shaffer). This exclusion was made because a group of about 10-20 members of the Church entered the Information Bureau prior to 9:00 A.M. with brooms and mops endangering the safety of the agents and interfering with the performance of their duties. See Trans. of July 12, 1979 at 159, 161, 168 (testimony of David Butherworth); Trans. of August 27, 1979 at 233-34. In the afternoon tours through the Information Bureau for Church representatives were conducted by the agents about every

half hour. Trans. of July 9, 1979 at 240-41 (testimony of Barry Weissman); Trans. of July 11, 1979 at 202-03, 221 (testimony of Luther Shaffer). Accordingly the Court finds that the government fully complied with Rule 41(d). Moreover, it is interesting to note that failure even to complete an inventory is merely a ministerial violation which does not affect the validity of the search. Reisgo v. United States, 285 F. 740, 741 (5th Cir. 1923). See Nordelli v. United States, 24 F.2d 665, 667 (9th Cir. 1928); United States v. Hooper, 320 F.Supp. 507, 509-10 (E.D.Tenn. (1969), aff'd, 438 F.2d 968 (5th Cir.) cert. denied, 400 U.S. 929, 91 S.Ct. 189, 27 L.Ed.2d 190 (1970).

VII. THE SCOPE OF THE SEARCHES WERE REASONABLE AND NOT GENERAL.

To a significant extent, the defendants' posture in this case is twisted. The government has indicated it will seek to introduce into evidence at the trial of this case 201 documents seized at the searches in California. The defendants have made no attempt to directly challenge the legality of the seizure of these case-in-chief documents. In fact, they have introduced exhibits which illustrate their opinion that 95% of the case-in-chief documents were described in the warrant, and thus properly seized. See Submission of List of Case-In-Chief Documents with Gennet Classification and United States Response to that Classification (August 15, 1979). Moreover, they contend that it is the

Court's duty to examine each and every document seized during the searches to determine the validity of its seisure, while indicating their belief that it would be error for the Court to look at the case-in-chief documents prior to trial. Compare Trans. of August 29, 1979 at 406, with, Motion for Return of Government's Indexed Case-in-Chief Documents (September 4, 1979) and Motion to Strike Appendix to Government's Analysis of Case-in-Chief Documents Compared to Ginnet Evaluation (September 4, 1979). Thus, it is the defendants' somewhat bizarre "theory of the case," that the Court is to decide whether the government can introduce the 201 case-in-chief documents at trial by examining everything seized during the search except the 201 case-in-chief documents.

In the usual case, the defendant directly challenges the validity of the seizure of the evidence which the government seeks to introduce at trial. Most defendants proceed in this manner because seizures are separable. Each item the government seeks to introduce into evidence is examined separately; those seized improperly are suppressed, while those seized properly are not suppressed. Merely because some evidence is seized beyond the scope of the warrant does not taint that evidence which has been properly seized. See e.g., United States v. Castle, 213 F.Supp. 56 (D.D.C. 1962), aff'd, 347 F.2d 492 (1964), cert. denied, 381 U.S. 929, 953, 85 S.Ct. 1568, 1811, 14 L.Ed.2d 687, 726 (1965); Brooks v. United States, 416 F.2d 1044, 1049-50 (5th Cir. 1969), cert. denied, 400 U.S. 840, 91 S.Ct. 81, 27 L.Ed.2d 75 (1970);

United States v. Holmes, 452 F.2d 249, 259 (7th Cir. 1971), cert. denied, 405 U.S. 1016, 92 S.Ct. 1291, 31 L.Ed.2d 479, 407 U.S. 909, 92 S.Ct. 2433, 32 L.Ed.2d 683 (1972); United States v. Mendoza, 473 F.2d 692, 696 (5th Cir. 1973); United States v. Artieri, 491 F. 2d 440, 445-46 (2d Cir.), cert. denied, 419 U.S. 878, 95 S.Ct. 142, 42 L.Ed.2d 118 (1974); United States v. Daniels, 549 F.2d 665, 668 (9th Cir. 1977); United States v. Forsythe, 560 F.2d 1127, 1134 (3d Cir. 1977).

For the purposes of this case, the key in this line is Andresen v. Maryland, 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976). In Andresen, the Supreme Court affirmed the conviction of the defendant on one count of false pretenses and three counts of misappropriation by a fiduciary.

Id. at 469, 484, 96 S.Ct. 2737. The defendant challenged the reasonableness of the searches and seizures from his corporation and his law office. Id. at 467, 96 S.Ct. 2737. A single document from the corporation, and seventeen items from his law office were introduced into evidence at his trial. Id. There was evidence that between 2% and 3% of the files in the law office were seized and less than 5% of the corporation's files were seized. Id. at 466-67, 96 S.Ct. 2737. Of the 52 items seized from the offices of the corporation, 45 were returned and the trial court suppressed six. Of the 28 items seized from the law office, seven were returned and four were suppressed. Id. at 467, 96 S.Ct. 2737. In the course of its opinion, the Court observed, "The record discloses that the

officials executing the warrants seized numerous papers that were not introduced into evidence. Although we are not informed of their content, we observe that to the extent such papers were not within the scope of the warrants or were otherwise improperly seized, the State was correct in returning them voluntarily and the trial judge was correct in suppressing others." Id. at 482, 96 S.Ct. at 2749 n.11. Thus, the Court explicitly approved a document-by-document approach. Those properly seized could be used in evidence even though at the offices of the corporation only one of the 52 items seized was ultimately determined to be properly seized. Therefore, Andresen can be read to hold that even if most of the documents seized by a valid warrant have not been properly seized, those properly seized can be intro-

duced into evidence at trial.

The defendants filed a special pleading just to meet the challenge Andresen presents to their "theory of the case." Defendants' Memorandum on the Applicability of Andresen v. Maryland to these Proceedings (August 24, 1979). In order to counteract the Andresen holding, the defendants cite essentially five cases. Each of these cases can be easily distinguished.

In Kremen v. United States, 353 U.S. 346, 77 S.Ct. 828, 1 L.Ed. 2d 876 (1957) (per curiam) the entire contents of the defendants' cabin were seized without a search warrant. Id. at 347-48, 77 S.Ct. 828. An eleven-page appendix detailing the personal items seized accompanies the opinion. Id. at 349-59, 77 S.Ct. 828. The Court held that the convictions must be set aside be-

cause evidence from the cabins was introduced at trial. However, the Court recognized that "the evidence seized from the persons of the petitioners might have been legally admissible." Thus, the Court did not refuse to distinguish between what was properly and improperly seized. Of course, in this case there are search warrants.

In United States v. Rettig, 589 F.2d 418 (9th Cir. 1978), federal agents sought to obtain evidence of a massive cocaine conspiracy. Id. at 420. A federal Magistrate declined to issue the search warrant. Id. The next day, the agents went to a state court judge and sought a warrant to seize evidence of possession of marijuana. Id. The Ninth Circuit found that the warrant was used as an instrument for conducting the search for which permission had been denied on the previous day, and that the

actual search pertained to evidence of the cocaine charge, not to the possession of marijuana. Id. at 412. The court did not refuse to permit the introduction of properly seized evidence. Instead, the court ruled that under the circumstances, such a determination was impossible. Id. at 423. In this case, as the defendants have admitted in their pleading, it is possible to determine which discrete items of evidence were within the bounds permitted by the warrant. Thus, Rettig is completely inapposite.

In Application of Lafayette Academy, Inc., 462 F.Supp. 767 (D.R.I. 1978), the court ruled that the warrant was a broad and general warrant; thus, severability was not permitted. Id. at 772. This Court has determined that the warrant in this case was not defective.

The defendants' citation of VonderAhe v. Howland, 508 F.2d 364 (9th Cir. 1975) can be described as disingenuous at best. In VonderAhe, agents arrived at the home and office of a dentist suspected of tax fraud and removed "practically every piece of paper they could lay their hands on." Id. at 365. The government had information that the dentist kept two sets of books--one for audits (white) and one for actual receipts (yellow sheets and green cards). Id. at 366. Despite the fact that the agents knew what they were looking for and where it was, the warrants were extremely broad. Id. The agents in executing the warrants made a room-by-room search of the premises including the purse of a Mrs. Perez who was visiting the dentist's wife. Id. at 367. The Court found that there was no probable cause for

the issuance of the warrants except for the yellow sheets and green cards, Id. at 369, and that the warrants were general warrants. Id. at 366. What remedy did the Court provide to the dentist? The Ninth Circuit in VonderAhe ordered all of the seized property returned except for the yellow and green cards. Id. at 372. One could not imagine a more persuasive case for severability than VonderAhe: despite an invalid warrant, and seizure of every piece of paper in a man's home and office, the Court ordered only the return of the improperly seized material. The following language in the case is instructive:

> The VonderAhes have asked us to invoke their favor what has become known as the "exclusionary rule," i.e., to decree at this time that all records seized, including yellow sheets and green cards and any leads therefrom cannot be introduced in any proceeding, civil or criminal against them.

However, if the facts are, as represented, that the taxpayers by their own wrong, deliberately concealed income and failed to pay taxes thereon, it would seem to be the height of inequity for the courts to enable them to profit thereby. Using equity as the standard, the warrants as issued restricted to the yellow sheets and green cards would have been reasonable; beyond these records they were too broad. Although the manner of execution was quite unjustified, the penalty of exclusion which the taxpayers would impose is equally unjustified. Our present task is to place the government's allegedly unlawful procedure in obtaining and executing the warrants and the VonderAhes' allegedly unlawful concealment on the mythical scales of justice, and observe the balance. Observing this balance (or possibly imbalance), we believe that justice can best be achieved by reversing the District Court dismissing the complaint and, upon remand, directing the District Court to grant the injunctive relief sought by appellants except as to the yellow sheets and green cards, copies of which the government may retain and use subject, however, to any and all objections thereto, including objections based on the Fifth Amendment, in any proceding, civil or criminal, which may be raised by the VonderAhes.

Id. at 372 (emphasis added).

Finally, the defendants rely on Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 99 S.Ct. 2319, 60 L.Ed.2d 920 (1979) which involves the seizure of magazines, films, and other objects from a bookstore on the basis of a New York obscenity statute. Id. at 2321. An investigator purchased two reels of film from a bookstore which he believed to be obscene. Id. at 2322. He took the film to a Town Justice for a search warrant. The Town Justice agreed that the films were obscene and drew up a warrant for the seizure of the films. The Town Justice then proceeded to the bookstore with some state police investigators to view the other material in the store. The Town Justice viewed and found to be obscene 23 films, 4 peep-shows, and 397 magazines. Id. at 2322-23. As each

item was seized, it was logged on the warrant. The Court held that the warrant was invalid because it did not even purport to describe particularly the things to be seized, Id. at 2324, and was a general warrant. Id. Furthermore, the Court found that the Town Justice did not manifest that neutrality and detachment required of a judicial officer when presented with a warrant for a search and seisure. Id. In the case before this Court, the warrant was proper and there is no allegation that the Magistrate lacked the neutrality and detachment required of a judicial officer.

Accordingly, the defendants' attempt to force the Court to focus exclusively on the material seized which is not being put into evidence is misguided. The

cases relied on by the defendants show that where the warrant is valid, and severability is possible, only material which has been illegally seized is suppressed.

Nevertheless, some cases not cited by the defendants' team of attorneys do provide that at some point an entire search may become so unreasonable that its unreasonableness infects the seizure of each and every item asported. United States v. Fernandez, 430 F.Supp. 794, 801 (N.D.Cal. 1976); United States v. Leta, 332 F.Supp. 1357 (M.D.Pa. 1971). Accordingly, the Court shall examine the reasonableness of the entire search to be completely certain that justice is done in this case.

A. The Standard to be Applied.

[11] The defendants argue that the

standard to be applied to the searches of the Church's premises is "scrupulous exactitude." In support of this contention the defendants rely on the Supreme Court's decision in Stanford v. Texas, 379 U.S. 476, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965). In Stanford, Texas law enforcement officers obtained a warrant to search for evidence of violations of the Texas Suppression Act which outlawed the Communist Party. Id. at 477, 85 S.Ct. 506. The officers gathered up about half the books they found in the house including works of Karl Marx, Jean Paul Sartre, Theodore Draper, Fidel Castro, Earl Browder, Pope John XXIII and Mr. Justice Hugo L. Black. Id. at 479-80, 85 S.Ct. 506. The officers also seized private papers and documents including a marriage cer-

tificate, insurance policies, household bills and receipts and personal correspondence. Id. at 480, 85 S.Ct. 506. Although the warrant called for the seizure of, among other things, "records of the Communist Party" and "party list and dues payments," no such material was found. Id. at 480, 85 S.Ct. 506. The petitioner moved for the return of this property. Id. The Court ordered it returned on the ground that the warrant was a general warrant. Id. In the course of its opinion, the Court held that:

> the constitutional requirement that warrants must particularly describe the "things to be seized" is to be accorded the most scrupulous exactitude when the "things" are books, and the basis for their seizure is the ideas they contain.

Id. at 485, 85 S.Ct. at 511-512 (emphasis added). Thus, the particularity of

a warrant must meet the scrupulous exactitude test when the items to be seized are books, and they are sought for the ideas they contain. Id. To make perfectly clear that the latter condition was not to be ignored, the Court in Stanford added the following footnote:

> The word "books" in the context of a phrase like "books and records" has, of course, a quite different meaning. A "book" which is no more than a ledger of an unlawful enterprise thus might stand on quite different constitutional footing from the books involved in the present case. . . . And in some situations books even of the kind seized here might, for the purposes of the Fourth Amendment, be constitutionally indistinguishable from other goods- e.g., if the books were stolen.

Id. at 485 n.16, 85 S.Ct. at 512 n.16. Thus, in order to determine whether the warrant in this case must meet the scrupulous exactitude standard, the Court must decide whether the documents sought

were wanted for the ideas they contain. Based on the warrant and affidavit, it is clear that no documents were sought for the ideas they contain. In fact, the memoranda sought are classic examples of "ledger(s) of an unlawful enterprise" and "stolen" written material. The warrant sought hundreds of documents allegedly stolen from the government, and written material which allegedly detailed the planning operation, and handling of such stolen material, as well as material prepared in order to cover up these actions. These documents were not sought as obscene or communist material; they were merely sought as contraband and ledgers of an unlawful enterprise. Therefore, the scrupulous exactitude test cannot be invoked. Merely because the defend-

ants kept their offices in a building belonging to the Church of Scientology does not insulate their actions from the process of law.

The point is made even clearer by comparing the defendants' contentions with the Supreme Court's decision in Zurcher v. Stanford Daily, 436 U.S. 547, 98 S. Ct. 1970, 56 L.Ed.2d 525 (1978). There, a warrant had been issued for the seizure of photographs of demonstrators at the Stanford University Hospital. Id. at 1974. The photographs had been taken by a Stanford student; who was at the demonstration as a reporter for the Stanford Daily, a student newspaper. Id. The warrant affidavit contained no indication that members of the Daily staff were involved in any unlawful acts. Id. at 1974. Thus, they were innocent by-

standers. Furthermore, the material sought was a third party's photographs of a newsworthy event, rather than ledgers of a criminal enterprise or contraband. In this case, the premises were not those of innocent third parties but those of people about whom there was probable cause to believe involvement in numerous criminal activities. Furthermore, the items sought by the warrant did not result from protected first amendment activity, as did the photographs in Zurcher. The material sought in this case was not obtained through newsgathering. Instead, there was probable cause to believe it was stolen through burglaries of government offices. These allegedly stolen documents, memoranda detailing the plans to obtain and then hide their theft, bear

only a remote relationship to materials seized in Zurcher. Accordingly, the defendants have failed to make out any facts which would require the application of the scrupulous exactitude test.

Although the Court rejects the defendants' attempt to invoke a higher standard, the Court recognizes that the true standard, reasonableness, is not a mechanical one. The nature of the material sought, and its location, are important elements in the application of the test. Although the scrupulous exactitude test does not apply, the Court has examined the facts and circumstances of this case with the utmost care in order to determine the reasonableness of the government's actions in conducting these searches. Of course, the government is required to act with

more care than if they were looking for heroin in a tool shed. What would be reasonable there would be inadequate in a search for documents in a Church.

B. The Geographical Scope of the Search.

[12] The defendants contend that the agents conducted general and exploratory searches outside the geographical bounds of the warrants. The facts do not support the defendants' contention.

The warrant for the Fifield Manor described the premises to be searched as follows:

> Fifield Manor, 5930 West Franklin Avenue, Hollywood, California, more particularly on so much of the premises described below as consists of the suite of offices of Mr. Henning Heldt located at 5930 West Franklin Avenue, Hollywood, California, a seven-story victorian building originally used as a hotel, known as "Fifield Manor," with entrance at the Franklin address as well as 1840 Tamarind Avenue. An information booth is located immedi-

> ately within the main entrance and adjacent to the information booth is an elevator providing access to the upper six floors. The first through the fourth floors and approximately one-half of the fifth floor contain hotel-type rooms designed to house visiting students. Additionally, portions of the first floor are devoted to dining, cooking and recreation facilities as well as several offices used in hotel administration. The remaining half of the fifth floor, as well as the sixth and seventh floors, in their entirety, house the offices of the "Guardian Office-U.S." of the Founding Church of Scientology in the United States. The office of Mr. Henning Heldt, the Deputy Guardian for the United States is located on the sixth floor, the last office on the left-hand side of the corridor.

Thus, the warrant called for the agents to enter the lobby, proceed via the elevator adjacent to the information booth to the sixth floor, and turn right off the elevator to the suite of offices of Henning Heldt. That is exactly what the agents did. Trans. of July 20, 1979 at 6003. The only other substantial activ-

ity in the Fifield Manor was the securing of the hallway outside the office of Henning Heldt for the protection of the agents and to prevent the destruction of evidence. Trans. of July 20, 1979 at 6008. Although there was testimony that agents may have quickly scanned some areas of the basement and elevator area of several flcors, there is no credible evidence to indicate that any rooms were entered, or documents read. The agents were merely insuring that no interference would be mounted. See Trans. of August 22, 1979 at 28-29 (always secure area). Certainly such minimal defensive activity cannot render the search of the Heldt suite a general search. Cf. Terry v. Ohio, 392 U.S. 1, 29, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) (Court recognized that the personal security of police officer

is to be factor in determination of reasonableness).[14/]

The only controversial question with respect to the scope of the Fifield Manor search was the activity in Janet Lawrence's office and the telex room. In deciding this issue, the Court was greatly aided by the view of the premises taken at the defendants' request. As one enters the inner office of Henning Heldt, one is struck by the appearance of a hut across the

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14/ In fact, the agents at the Manor must be complimented for the way they restricted their search. Certain defense counsel have argued that there was a room that was never entered only doors away from the Heldt suite which was plainly marked to indicate that it would contain "programs." It is defense counsel's contention that this oversight reflects poorly on those executing the warrant. However, the Court must disagree. It evidences the intention of those conducting the search not to let their attention be diverted and to stay within the four corners of the warrant.

terrace of the roof.[15/] Access to the hut is available through French doors in the Heldt office. From the vantage point of an agent attempting to locate the boundary of the Heldt suite, it would be reasonable to assume that this hut, right outside the doors of the Heldt office, would be part of the suite. Much has been made of the strict definition of a "suite." Webster's Third New International Dictionary defines "suite" as "a series or group of things forming a unit or constituting a complement or collection: SET: as a (1): a group of rooms designed for occupancy as a unit." Since the nearest entrance to the hut was through the office of Henning

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15/ The Court paced off the distance between the Heldt office and the hut. The distance is approximately nine feet.

Heldt, it was logical to assume that those offices formed a unit. In fact, Janet Lawrence testified that she, and her co-workers in the hut, had to use the rest-room in the Heldt office. Trans. of August 29, 1979 at 326. She further testified that on the day of the search the office was unmarked; thus, there was nothing to indicate that it did not constitute part of the Heldt suite. Trans. of August 29, 1979 at 346-47.

Similar logic applies to the telex room. The only other entrance to the roof terrace is through French doors in the telex room. Together, Heldt's office, the telex room, and the hut form a logical collection of connecting rooms apparently designed for use as a single unit.

Furthermore, had the agents improperly strayed beyond the bounds of the Heldt suite, the remedy, at most, would be to suppress the evidence seized from these areas. The facts are that nothing was seized from the telex room, Trans. of July 21, 1979 at 6273, and no case-in-chief documents were seized from the office of Janet Lawrence. In this case, the agents, in good faith, came to the conclusion that the telex room and the hut were parts of the Heldt suite. Trans. of July 18, 1979 at 5637; Trans. of July 20, 1979 at 5988, 6120-26; Trans. of July 21, 1979 at 6270. To suggest that this decision rendered the entire search a general exploratory search is untenable.

The warrant for the Cedars-Sinai Complex described the premises to be searched

as follows:

> Cedars-Sinai Complex, 4833 Fountain Avenue, Hollywood, California, and more particularly on the first floor area housing the offices occupied by the Deputy Guardian for Information and his staff and personnel, in the premises described below:
>
> A building complex known as Cedar-Sinai located at 4833 Fountain Avenue, Hollywood, California, previously known as the Cedars of Lebanon Hospital. The building is creme-colored concrete, multi-winged, and occupies the entire square block. It is surrounded by a six-foot chain link fence with barbed wire on top. A blue sign on each of the four corners identifies the property as "Church of Scientology." The building is eight stories high with a ten-story central tower. On the south of the building is Fountain Avenue, on the north is Sunset Boulevard, on the east is Berendo Street, and on the west is Catalina Street. The only entrance is through a guarded gate on Catalina Street.

Instantaneous with their entry into the Cedars Complex, the agents attempted to locate the Information Bureau. See Trans. of August 23, 1979 at 165. Their efforts were stymied by the unwillingness of the

of the Church personnel to assist them in their attempt. Trans. of July 9, 1979 at 61-63 (testimony of Dennis Young); id. at 182-83 (testimony of Christopher Lynch); Trans. of July 11, 1979 at 216 (testimony of Luther Shaffer). Preliminary search teams were dispatched throughout the building. These teams were to scan the entire building in order to secure the premises, determine who was present, and to locate the file cabinets described in the affidavit. Trans. of August 27, 1979 at 17-19. These teams were not to search file cabinets, but only to report back what they found. Id. at 19-20.

As part of the preliminary search, the agents went to the basement of the Services Building when smoke was seen pouring from the boiler room. Trans. of July 9, 1979 at 189 (testimony of Christopher

Lynch). The agents' concern was exacerbated by the statement in the search warrant affidavit that the boiler room posed a security risk to the Information Bureau. Trans. of August 23, 1979 at 116. The agents clipped padlocks after failing in their attempt to get keys to several rooms in the basement. Trans. of August 27, 1979 at 104. There is no evidence that anything was seized from these rooms.

Agents began searching an area labeled the "Action Bureau." Trans. of July 16, 1973 at 243-44. This area was in close proximity to the Information Bureau. The few documents seized from these offices were returned to the Church. Id. at 444-45. The agent in charge of searching this area had a good-faith belief that it was an annex of the Information Bureau while he was searching it. Id. at 244.

Finally, a telephone equipment room near the Information Bureau was forcibly entered by an agent who heard strange noises coming from the room. Defendants' Exhibit 543A.

Once again, in determining the reasonableness of the agents' actions, the Court is greatly assisted by the view of the premises performed at the defendants' request. The Cedars Complex is a mass of confusing corridors, tunnels, and offices. At the time of the search, the building was being fully renovated from a hospital to an office building. Many of the hospital signs had yet to be removed. The agents were unable to gain entry into the Information Bureau. The affidavit indicated that only the Information Bureau had moved into the complex. Trans. of August 24, 1979 at 33. Scien-

tology personnel failed to indicate the location of those offices to the agents. The size of the complex is enormous. The agents had a duty to prevent the destruction of evidence. Together, these circumstances made a degree of confusion reasonable. In light of all these factors, the Court finds that the agents, in their search of the Cedars Complex, acted reasonably and in good faith. Thus, the geographical scope of the search did not render it general or exploratory.

The defendants also contend that any searches except for those of filing cabinets were outside the scope of the warrant. First, the warrants did not limit the searches to filing cabinets. In the Manor, it was limited to the suite of offices of Henning Heldt, and in the

Cedars Complex it was the offices occupied by the Deputy Guardian for Information and his staff and personnel. Second, nothing in the affidavit limited the location of the documents to filing cabinets. A fair reading of the affidavit would indicate that the documents described in the warrant could be found in places other than the filing cabinets. Finally, nothing in the Court of Appeals decision upholding the facial validity of the District of Columbia warrant limited its validity to filing cabinets. In re: Search Warrant Dated July 4, 1977, supra. Accordingly, the agents acted reasonably and in good faith, and did not exceed the geographical bounds of the warrant in searching desks, in/out baskets, etc., in the offices specified in the warrant.

VIII. THE SEIZURE BY THE AGENTS OF SOME ITEMS NOT WITHIN THE WARRANT DOES NOT REQUIRE THE SUPPRESSION OF ALL EVIDENCE SEIZED.

The Court will now turn to the issue on which defense counsel have spent most of their energies-whether the seizure by the agents of documents outside the warrant requires the suppression of all evidence seized. In support of their legal contention, the defendants make the following factual arguments. First, the defendants contend that there was no attempt on the part of the government to restrict the searches and seizures to what was in the warrant. Second, the defendants contend that the vast majority of documents seized were outside the warrant. The Court finds that the government made good-faith and reasonable efforts to limit the searches and seiz-

ures to items within the warrants or otherwise legally seizable. Finally, the Court finds that the defendants have failed to sustain their burden with respect to the degree of documents seized outside the scope of the warrant.

A. The Government Made Reasonable Attempts to Limit the Search and Seizure to Items Legally Seizable.

[13] In language especially appropriate for this case, the Supreme Court observed in Andresen v. Maryland, 427 U.S. 463, 480 n.10, 96 S.Ct. 2737, 2749 n.10, 49 L.Ed.2d 627 (1976):

> The complexity of an illegal scheme may not be used as a shield to avoid detection when the state has demonstrated probable cause to believe that a crime has been committed and probable cause to believe that evidence of this crime is in the suspect's possession.

In order to determine the reasonableness of the government's conduct in this case,

the Court must view the problem facing the government when the allegations in the affidavit became known. There was probable cause to believe that the leaders of a large religious organization were involved in complex, sophisticated conspiracies to illegally obtain government documents and to cover up their activities. The government had probable cause to believe that evidence of these and related crimes was located in the offices of the Church in two locations. The government had probable cause to believe that at one location there would be 250 filing cabinets with evidence of criminal activity. Due to the nature of the allegations, the reasonable thing to do would be to obtain the services of numerous agents of the Federal Bureau of Investigation [FBI] to conduct the searches, and

to prepare these agents for their task by conducting an extensive briefing session. That is what the government did in this case.

On July 6, 1977, about 100 agents of the FBI were informed that they would be participating in a search two days hence. They were also told that their presence would be required at a briefing beginning in the morning of the following day. See, e.g., Trans. of August 8, 1979 at 16.

The July 7, 1977 briefing began about 8:00 to 8:30 A.M., with a general briefing for about 100 agents who were to participate in the search the following day. Trans. of July 16, 1979 at 94, 142-43. It lasted until about 5:00 P.M. Id. at 151. The speakers included the Assistant Director of the Los Angeles

Field Office of the FBI, Agent Gebhardt; the agents who would be in charge of the searches at each location, Agents McCarthy and Lindbergh; the case agents for Los Angeles and Washington, D. C., Agents Tittle and Varley; and two Assistant United States Attorneys who were handling the case in the District of Columbia. Id. at 158; Trans. of August 23, 1979 at 9; Trans. of August 17, 1979 at 80. The morning session involved a general discussion of the investigation up to that time, the physical set-up of the buildings, and the manner in which the search was to be conducted. Trans. of July 16, 1977 at 164. The agents were told that they were to be searching a church; they were informed of the priest-penitent privilege, and were told to act accordingly. Id. at 164, 231; Trans. of

August 23, 1979 at 13; Trans. of August 22, 1979 at 21-22. They were told that the Church of Scientology had over three million adherents and that they could expect unfavorable press coverage. Trans. of July 16, 1979 at 188. They were told that the members of the Church were peaceful, passive people and that violence would be unnecessary. Id. at 171-72. They were told that patience and restraint were needed. Id. at 171-72. They were told to initially secure the building because destruction of evidence was feared. Id. at 194-95. They were told what types of files to look for. Id. at 204. They were told to read the affidavit. Id. at 161. Each item in the description of property to be seized was discussed. Id. at 275. The agents were told that it was possible that

they could find evidence which could be used for probable cause elsewhere. Id. at 277. They were told to be sure to prepare FD 302's, which are forms used by the FBI to log what is seized in a search. Id. at 230. They were told that the search would probably result in litigation. Id. at 217. Most of the agents summarized this advice with the word "professional,"-the agents were to conduct themselves in the highest professional manner. See e. g., Trans. of August 22, 1979 at 21.

Sometime before lunch, the copies of the affidavit were distributed. Trans. of July 16, 1979 at 145. An hour break was given to allow the agents to read the affidavit. Id. at 148, 153, 154. Following the break, there was a question and answer session. Id. at 148, 153, 225.

Later, the meeting was divided into smaller groups according to the role the agents would be performing and where it would be performed. Id. at 144, 149, 153, 225. Thus, the entry teams for the Manor and Cedars met separately, as did the document search teams, and the photography teams.

On the day of the search, the warrant and affidavit were available to the agents. See note 13 supra. In addition, supervisory personnel, team leaders, and lawyers for the United States Attorney's Office and the FBI were available and often consulted. Trans. of July 16, 1979 at 288; Trans. of July 18, 1979 at 5575-76; Trans. of July 20, 1979 at 5999-6000, 6002, 6212; Trans. of July 21, 1979 at 6257, 6276, 6279, 6382; Trans. of August 16, 1979 at 122, 139, 166;

Trans. of August 17, 1979 at 215; Trans. of August 20, 1979 at 101; Trans. of August 21, 1979 at 111, 127-28; Trans. of August 22, 1979 at 55; Trans. of August 23, 1979 at 87; Trans. of August 24, 1979 at 148; Trans. of August 27, 1979 at 50; Trans. of August 28, 1979 at 102, 259-60.

As the search progressed in the Information Bureau at Cedars, it became apparent to the FBI supervisory personnel that the manpower on hand was inadequate. Trans. of August 24, 1979 at 35. Therefore, additional agents were ordered to proceed to the scene. Id. at 35. Some of these agents had not attended the briefings of July 7. Id. at 35-36. Instead, they were given more limited briefings as they arrived, first by FBI supervisory personnel, and then by their

team leaders. Id. at 36, 39, 89-91, 126. The late-arriving agents' attention was directed especially to those items in the warrant which earlier agents had found to be prevalent in that area. Id. at 121. They were told to act in the utmost professional manner. Id. at 43. The warrant and affidavit were made available for these agents to read. Id. at 42. While searching, the warrant, affidavit, and FBI personnel were available for consultation. Id. at 43. The arriving agents were told that if they had any question, they were to consult with team leaders, other agents, and their superiors. Id.

The testimony adduced at the hearing showed that the agents understood the warrant and the affidavit, and made good faith and reasonable efforts to comply

with them. The agents understood item 162 of the description of property. See e. g., Trans. of August 21, 1979 at 143 (Agent Valencia: "162 dealt with obtaining instrumentalities and fruits of a conspiracy dealing with obstruction of justice and theft of government property as supported by the affidavit."); Trans. of August 16, 1979 at 195 (Agent Breen: "if there were other documents not listed in the description of property here that appeared to indicate a theft of Government property had occurred, ..."); Trans. of July 18, 1979 at 5496 (Agent Stovall: the objectives of the conspiracies were "to steal government documents."). In addition, the agents seized a very small percentage of the documents they went through. See e. g., Trans. of July 16, 1979 at 300

(less than 3%); Trans. of August 22, 1979 at 122 (1.5%); Trans. of August 22, 1979 at 52 (less than 1%).

The defendants have also argued that the agents exceeded the bounds of the warrant by taking photographs during the execution of the warrant. These photographs were taken by the FBI in order to accurately record the events of the search by showing that Church personnel could freely move about the premises, to show the condition of the premises before and after the search. Trans. of July 17, 1979 at 504; Trans. of August 23, 1979 at 205; Trans. of August 24, 1979 at 15-16; Trans. of August 27, 1979 at 170; Trans. of August 20, 1979 at 148-49. The defendants contend that such efforts to record the events of the day of the search violate the first

amendment rights of the defendants. The Court disagrees. If you can see it, you can photograph it, "since this amounts to nothing more than making a record, not differing essentially from a full written description." Prosser, Law of Torts at 809 (4th ed. 1971). The agents were legitimately on the premises to conduct the search and observe the people, and the conditions of the premises. Therefore, it was proper to take photographs. The Court finds that the creation of such a record is a good police practice.

Accordingly, the Court finds that the government, through its agents, made adequate, good faith and reasonable efforts to limit their seizures to evidence which could be propertly seized.

B. The Defendants Have Failed To Show that Scope of the Seizures Was Unreasonable.

The "plain view" doctrine has received the Supreme Court's explicit approval. See Coolidge v. New Hampshire, 403 U.S. 443, 464-72, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). In order to justify a seizure on plain view grounds, several conditions must be met. First, the initial intrusion which brings the agent within plain view of an article must be proper. Coolidge v. New Hampshire, supra at 465, 91 S.Ct. 2022. Second, the incriminating article must be noticed inadvertently. Id. at 467-71 & n.25, 91 S.Ct. 2022. Third, the article must be of an incriminating character which is evident immediately upon its discovery. Id. at 465, 91 S.Ct. 2022.

Although none of the documents designated by the government to be used in its case-in-chief were seized under the plain view doctrine, the application of this concept to the searches is necessary in order to evaluate the defendants' claims with respect to the scope and breadth of the documents seized.

[14] The defendants contend that the plain view doctrine is inapplicable to this case, because the search involved documents, the evidence was not incriminating, and their discovery was not inadvertent. The Court disagrees.

In this case, the initial intrusion which brought the documents within the plain view of the agents was proper. In order to execute the warrants, the agents were required to glance through the documents in the areas designated by the war-

rant.[16/] This case does not present the problem faced by the Supreme Court in Stanley v. Georgia, 394 U.S. 557, 89 S. Ct. 1243, 22 L.Ed.2d 542 (1969). In Stanley, the agents while searching for gambling paraphernalia came across movies which they viewed by using a nearby projector. Id. at 558, 89 S.Ct. 1243. In this case, the agents did not have to do anything to determine that the documents were incriminating except that which they were required to do to execute the warrants: look at documents. The agents in Stanley did not have to

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16/ The defendants contend that only item 162 in the description of property required the agents to glance through the documents. The Court must reject this contention. Many documents listed in the description of property would not be self-evident by merely glancing at the format and title. See e. g. items 149-51, 157.

view a movie to locate gambling paraphernalia.

The second requirement is that discovery must be inadvertent. If the execution of the warrant is merely a subterfuge to search for other evidence, the plain view doctrine cannot be invoked. Coolidge v. New Hampshire, supra 403 U.S. at 469-71, 91 S.Ct. 2022. If the discovery is anticipated and the location is known, agents are compelled to obtain a warrant. Id. at 470-71, 91 S. Ct. 2022. There has been no credible evidence in this case to indicate that the agents knew in advance the nature or location of other incriminating evidence or that the warrant was obtained

as a subterfuge.[17/]

Third, the article seized must be of an incriminating character. Immediately upon observing the article, the agent must have probable cause for its seizure. See United States v. Williams, 385 F. Supp. 1400, 1405 (E.D.Mich.1974). During the search of a cabinet labeled "Confes-

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17/ One Church witness testified that he stumbled into an FBI briefing unnoticed and overheard a supervisor telling a group of agents that their "cover" was that they were looking for stolen government documents, but they really were looking for anything related to the FBI, the Food and Drug Administration, the American Medical Association, and the Better Business Bureau. The Court does not find this testimony to be credible. Besides numerous other indicators, the witness made no mention of this incident in his contemporaneous notes that were produced at the hearing. Trans. of July 7, 1979 at 94.

sional Formulary" in the Information Bureau, Special Agent Oppy came across a document[18/] which is set out in its

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18/ "RED BOX DATA INFORMATION SHEET
1. What is Red Box data?
a) Proof that a Scnist is involved in criminal activities.
b) Anything illegal that implicates MSH, LRH.
c) Large amounts of non FOI docs.
d) Operations against any government group or persons.
e) All operations that contain illegal activities.
f) Evidence of incriminating activities.
g) Names and details of confidential financial accts.
2. Where is Red Box data kept?
a) Out of date material or finished cycles that can be shredded should be.
b) Large amounts of red box data that is not needed for day to day function but cannot be destroyed is located with all our NON FOI docs-and can be called for via CIC.
c) Small amounts oi data that must be kept on hand due to security and frequent use-is to be kept in a briefcase locked up-and is to be marked. (in BI office area)
3) How is Red Box data, kept on the

(fn. cont'd.)

entirety in the margin. Trans. of July 17, 1979 at 448-49. After this seizure an order went out for agents to watch for documents marked "red box" because "red box" meant that some of the documents might have been stolen. See Trans. of August 27, 1979 at 73.

18/ (Cont'd.)

> BI premises cared for?
> a) This data will be picked up and carried out of the building by the 'owner' immediately upon notification of a raid, search warrant etc.
> b) Persons carrying this data (as few as possible) will leave the premises and only return when they have called in and received an 'all clear'. (Details of who goes where with what data will be sorted out later-and drilled)"

Government Exhibit 38.

Aside from red-box data, a second large class of documents were seized under the plain view doctrine. These documents discussed infiltration and covert operations to obtain documents from private and state organizations.[19/]

19/ See e. g. Government Exhibit 111, a Guardian order which states:

> "Program: . . . 12. Simultaneously with the above action, recruit and place operatives in the following places:
> A. STL BBB
> B. STL Post Dispatch
> C. STL Globe
>
> 18. Obtain files on Scientology, using in place operatives, from the following:
> A. STL BBB, including Williams & Schmidt's offices
> B. STL Post, including Adams, McGuires' offices
> C. STL Globe including Bauman's and Shepard's offices . . .."

[15] The Court finds that the agents seizure of red box data, and evidence of covert infiltration of private and state organizations to obtain documents were reasonable. The agents, with knowledge of the warrant and affidavit, had probable cause to believe that this material was evidence of criminal activities. See United States v. DiGilio, 538 F.2d 972 (3d Cir.), cert. denied, 429 U.S. 1038, 97 S.Ct. 733, 50 L.Ed.2d 739 (1976). Each and every element of an offense need not be made out beyond a reasonable doubt before evidence can be seized under the plain view doctrine. United States v. Williams, supra at 1405. All that is required is probable cause that it is evidence of a crime. The Court finds that the seizure of these two large classes of material were

reasonable.[20/]

Finally, the defendants contend that the plain view doctrine does not apply to searches for documents. The Court must reject this contention. In Marron v. United States, 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed.231 (1927), holding approved in Coolidge v. New Hampshire, supra 403 U.S. at 469 n.26, 91 S.Ct. 2022, a ledger and certain bills were introduced into evidence in the criminal trial of the petitioner for violations of the National Prohibition Act. Marron v. United States, supra at 193, 48 S.Ct. 74. The agents seized the bills and ledger while executing a search warrant

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20/ Some physical evidence was also seized under the plain view doctrine. This included a loaded gun which was seized after the agents were unable to find its owner. Trans. of August 17, 1979 at 124-25.

for intoxicating liquors and articles for their manufacture. Id. The evidence showed that they searched for and found large quantities of liquor, some of which were in a closet, and that while in the closet, the agents noticed the ledger showing inventories of liquors, receipts, and expenses. Id. at 193, 48 S.Ct. 74. Beside the cash register, the agents found the bills. Id. The Court upheld the seizure. Id. at 199, 48 S.Ct. 74. Later cases stress that Marron involved the plain view doctrine. See Coolidge v. New Hampshire, supra 403 U.S. at 469 n. 26, 91 S.Ct. 2022.

This Court would not necessarily approve the holding in Marron. The care with which a document is examined must be an element in the finding that the plain view doctrine applies. See Commonwealth

v. Hawkins, 361 Mass. 384, 280 N.Ed.2d 665 (Mass.1972); Commonwealth v. Bowers, 217 Pa.Super. 317, 274 A.2d 546 (1970). If the agents in Marron were looking for liquor bottles and related equipment, there was no authority to read the ledger and bills to determine that they were incriminating. But, this case is not Marron. Here, the agents were required to glance through the documents to execute the warrant. Thus, incriminating documents can be seized if the three other general requirements are met as they are in this case. See also United States v. Parker, 530 F.2d 208, 211-212 (8th Cir. 1976) (address book and ledger seized in search incident to arrest); United States v. Maude, 156 U.S.App.D.C. 378, 481 F.2d 1062, 1069-72 (D.C.Cir. 1973) (Robinson, J.) (identification

cards seized during search for stolen money orders); United States v. Teller, 412 F.2d 374, 379 (7th Cir. 1969) (per curiam), cert. denied, 402 U.S. 949, 91 S.Ct. 1603, 29 L.Ed.2d 118 (1970) (index cards seized during search for money); United States v. Cooper, 409 F. Supp. 364, 368-69 (M.D.Fla.), aff'd, 542 F.2d 1171 (5th Cir. 1976) (records of illegal sales and recordkeeping seized during lawful examination of logbook of arms dealer).

The Court allowed the defendants to introduce evidence that they commissioned two "scientific" studies which found that about 70% of the documents seized were not within the warrant. Even ignoring the serious logistical problems, these studies offer little assistance to the Court. First, even if they properly

measure the percentage of documents improperly seized, these figures alone would be legally irrelevant. See Andresen v. Maryland, supra. Second, by ignoring the plain view doctrine, they do not even purport to measure the percentage of documents legally subject to seizure. Finally, even accepting these theoretical errors, the Court finds the studies to be valueless due to basic analytical flaws in their interpretation of the warrant. For example, the defendants' "expert" insisted that Government exhibit 137 was outside the warrant. Trans. of August 29, 1979 at 215. The document is entitled "Re: Herb." The affidavit states that Meisner's code name was "Herbert." Aff. at 20 n.*. Furthermore, the document goes on to state that "[h]e wants the guards totally off, but for control

purposes in monitoring exact actions, we are maintaining it with some additional freedom as he improves." The document is dated May 13, 1977. The affidavit states:

> After June 14, 1976, Meisner was named National Secretary of the Church of Scientology and maintained an office at the Guardian's Office in L. A. However, when the Church discovered that a warrant had been issued for his arrest in D.C., he was removed from any official position with the Church, while retaining functions in an unofficial capacity. This situation continued until sometime in April, 1977 when Meisner indicated that he was tired of waiting and wished to be sent back to D.C. as soon as possible. When Meisner threatened to take the situation in his own hands, he was placed under twenty-four-hour guard and was repeatedly "audited" by the Church. On one occasion he was removed from one building to another handcuffed and gagged. On another he was apprehended by church members in Las Vegas and returned under their custody to Los Angeles where he was again placed under house arrest. (footnote omitted).

Item 162 of the description of property called for the seizure of "[a]ny and all

fruits, instrumentalities, and evidence (at this time unknown) of the crimes of conspiracy, obstruction of justice and theft of government property in violation of 18 U.S. Code §§ 371, 1503 and 641 which facts recited in the accompanying affidavit make out." The Court finds that the document falls within item 162 of the description of property as evidence of the crimes of obstruction of justice and conspiracy.

Besides the studies, the defendants rely on In re Search Warrant Dated July 4, 1977, Misc. No. 77-951 (D.D.C. August 24, 1979) and contend that the mere fact that the government returned 40% of the seized documents to the Church indicates the amount that was improperly seized. In this case, the United States has represented to the Court that returned

documents were deemed unnecessary. The Court has absolutely no reason to doubt the word of the government representatives in this case. In addition, this procedure was approved by the Supreme Court in Andresen v. Maryland, supra 427 U.S. at 482, 96 S.Ct. 2737. Moreover, if the courts take the return of documents as an admission of error, such activity, which should be encouraged, would be chilled: the government will not return property out of fear that it will be interpreted as an admission of impropriety.

Accordingly, the Court finds that the defendants have failed to meet their burden of proof as to the scope of the seizures. Perhaps some documents were seized outside the warrants, however, some error must be expected and is en-

tirely reasonable. There has been no showing that the degree of error was so egregious that the entire search was exploratory or unreasonable.

The defendants' arguments that the searches violated their procedural rights and that the government proceeded in bad faith are also rejected.

IX. CONCLUSION.

No one in our civilized society is pleased by searches of Churches lasting twenty hours and involving over 150 FBI agents. However, the fourth amendment does not provide a mechanical rule that prevents searches of certain places, at certain times, by more-than-so-many people. Overall, the FBI agents who executed the warrants at issue in this case performed a very difficult job in

a most reasonable manner. When the government has probable cause to believe that evidence of criminal activity is present in a particular place, government agents have a responsibility to pursue their investigation. It is most unfortunate that the information which came to the government in this case required that searches be conducted by numerous agents, for long hours, in buildings owned by a Church. However, the fourth amendment cannot become so inflexible that criminal activity can be completely insulated from our criminal justice system by the talismanic invocation of religion. We can only hope that never again in our history will the government be required to perform such an unseemly task.

The Court has examined the documents that the government intends to submit during its case in chief. The Court finds that there is no evidence to indicate that these documents were improperly seized: they are within the warrants and were seized from areas described in the warrants. The government is not barred by the fourth amendment from introducing these documents into evidence at the trial of this case.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
		Cr. No.
v.	:	78-0401
MARY SUE HUBBARD, et al.	:	

O R D E R

In accordance with the Memorandum Opinion issued of even date herewith, it is, by the Court, this 13th day of September, 1979,

ORDERED, that the Motions of the defendants to suppress evidence be, and the same hereby are denied.

(signed)
Charles R. Richey
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA :
Criminal Case
v. : No. 78-401
MARY SUE HUBBARD, et al. :

ORDER

This action is currently before the Court on two motions which seek the same relief on identical grounds. The defendant Mary Sue Hubbard has requested a transfer of this case to another judge for sentencing, while the other eight defendants have joined in a request for specific performance of the agreement as outlined in this Court's Order of October 8, 1979. In both motions the defendants contend that they must be sentenced by another judge because the government has violated its agreement not to allocute

with respect to the defendant Mary Sue Hubbard. The Court finds that no such violation has occurred. Accordingly, the motions are denied.

The plea disposition agreement enforced by the Court provides:

> The government retains the right to allocute on matters in any fashion it chooses as to all defendants except the defendant Hubbard. As to the defendant Hubbard, the government agrees to advise the Court as follows: "the government takes no position and is making no request on the matter of sentence with respect to the defendant Hubbard." It is understood that Mrs. Hubbard through her counsel will make no statement in allocution concerning the facts of the case. It is further agreed that as to any defendant, including Mrs. Hubbard, the government may dispute any statements of fact on any matter with which it has disagreement. (emphasis added).

On October 26, 1979, the government filed a motion for reconsideration of the Court's Order. In footnote 3 on page 7

of its motion the government asserted that, "Mr. Rauh would have testified that he believed that Mrs. Hubbard should receive a jail sentence especially since she was at the head of the conspiracy. The government agreed not to allocute as to Mrs. Hubbard because this issue was holding up the possible disposition and because the government believed that the Court would impose the appropriate jail sentence."

The government's proffer was made in direct response to testimony of defense counsel for the defendant Hubbard during the hearing on the motion to enforce the disposition agreement. At that hearing, Mrs. Hubbard's lawyer testified that the government had indicated to him that it had no desire to see his client go to jail, but that it could not say that in

open court for policy reasons. Tr. of October 5, 1979 at 123.

Plainly, as a matter of fairness, and more importantly under the plea disposition agreement itself, "as to any defendant, including Mrs. Hubbard, the government may dispute any statements of fact on any matter with which it has disagreement." United States v. Hubbard, Criminal No. 78-401 (D.D.C. October 8, 1979) at 10. The government disagreed with a statement of fact made by counsel for the defendant Hubbard and made its disagreement known to the Court. This action was completely consistent with the disposition agreement.

Since there has been no breach of the disposition agreement by the government the Court need not reach the issue of

what remedy would be appropriate if such a breach had in fact occurred.

Accordingly, upon consideration of the entire record herein, it is, by the Court, this 16th day of November, 1979,

ORDERED, that the motion of the defendant Hubbard for transfer to a different judge for sentencing be, and the same hereby is, denied; and it is

FURTHER ORDERED, that the motion of the defendants for specific performance of the agreement as outlined by the Court's Order of October 8, 1979, be, and the same hereby is, denied.

(signed)
Charles R. Richey
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA :
v. : Criminal Case No. 78-401
MARY SUE HUBBARD, et al. :

ORDER

This action is before the Court on two related motions. First, the defendant Mary Sue Hubbard moves for the Court to vacate the plea agreement and to dismiss the indictment, and alternatively for specific performance of the plea agreement. Second, all other defendants except Mrs. Hubbard move the Court for dismissal, or in the alternative specific performance of the agreement outlined by the Court in its Order of October 8, 1979. For the following reasons, both of these motions will be denied.

Essentially, both motions charge that the government has breached its agreement, which was enforced by the Court in its Order of October 8, 1979, not to allocute with respect to the defendant Mary Sue Hubbard on two occasions. First, the defendants contend that the government breached its agreement in its memorandum of law in support of its motion for reconsideration of the Court's October 8, 1979 Order. Second, the defendants contend that the government breached its agreement during discussions with the probation office.

On November 16, 1979, this Court denied the motion of Mrs. Hubbard for the transfer of this case to another judge for sentencing and the other defendants' motion for specific performance of the disposition agreement. Those motions

raised the exact same arguments, in different language, that are advanced in the present motions.

In the Order of November 16, 1979, this Court held that the disposition agreement required the government to state at allocution that "the government takes no position and is making no request on the matter of sentence with respect to defendant Hubbard." Furthermore, the Court held that the government, under the agreement, had the right to dispute any statements of fact on any matter with which it had disagreement as to any defendant including Mrs. Hubbard. The Court went on to hold that the government's statements in its pleadings requesting reconsideration of the October 8, 1979 Order were permissible under the agreement because they were in direct

response to factual allegations of defense counsel. Accordingly, the Court decided that the defendants were not entitled to any relief.

Now the defendants are before the Court repeating the exact same basis for relief: that the government breached the disposition agreement by making statements in their pleading with respect to the defendant Hubbard, plus the additional ground of statements made to the probation officials.

With respect to the statements in the government's pleading requesting reconsideration of the Court's Order of October 8, 1979, this Court's Order of November 16, 1979 has already resolved this issue: there was no breach because the government was, as it is permitted to do under the agreement, merely disputing

factual allegations made by the defendants.[1/]

With respect to the allegation of statements to the probation office, counsel admits that any offending language was removed from the probation reports before they were made available to this Court.[2/] The statement which offends the defendants is that "culpability is associated with the status in the hierarchy

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1/ In this regard, it is important to note that the defendants signed the stipulated record, along with their counsel long ago and after the plea agreement was ordered enforced at the defendants' request on October 8, 1979.

2/ The Probation Office Presentence Reports, the government's and defendants' memoranda in aid of sentencing were all delivered to the Court at the same time.

in the Church of Scientology." This statement did not appear in the presentence report prepared on Mrs. Hubbard but only in those of the other eight defendants currently before the Court. After the statement, in the reports furnished to the Court, was a listing of the relative hierarchy of the defendants except Mrs. Hubbard.

One can infer from the uncontested stipulated record in this case that Mrs. Hubbard was the highest ranking official of the Church named in the indictment, and if the government had not agreed not to allocute, the government may have argued that culpability, even for Mrs. Hubbard, would depend on her relative status in the hierarchy of the Church. However, the fact that such inferences can be drawn does not mean in the

slightest that the disposition agreement was violated.

Plainly, the government had the right to characterize the crimes for which the defendants, except for Mrs. Hubbard, were convicted. From these statements, one could infer that if given the chance the government would characterize the crimes for which Mrs. Hubbard has been found guilty in the same terms.[3/] Under the dispostion agreement, the government was permitted to allocute at sentencing as to all the other defendants except Mrs. Hubbard. The agreement did not, and of course could not, provide that Mrs. Hubbard would be sentenced by another judge. Mrs. Hubbard was convicted along

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3/ Of course, the government did not and acted within the letter and spirit of the agreement.

with six other defendants of the crime of conspiracy to obstruct justice. The allocution against the others would necessarily involve frank discussions of the nature of the conspiracy all had joined, and the punishment which would be appropriate. The fact that one could infer from these statements the government's position with respect to Mrs. Hubbard is legally insignificant and did not violate the agreement.

Accordingly, there has been no violation of the agreement between the parties as set out in this Court's decision of October 8, 1979. The disposition agreement did not insulate Mrs. Hubbard, and could not insulate Mrs. Hubbard, from the alleged spillover effects from the allocution with respect to the other defendants. In fact, this Court took pre-

cautions to see that this was not done. The motions currently before the Court are no more than an attempt to get more than what was bargained for, and, therefore, must be rejected.

Upon consideration of the entire record herein, it is, by the Court, this 17th day of December, 1979,

ORDERED, that the motion of the defendant Hubbard to vacate the plea agreement and to dismiss the indictment, and alternatively for specific performance of the plea agreement be, and the same hereby is, denied on the ground that the defendant Hubbard is entitled to no relief because the government has not violated the disposition agreement as set out in the Court's Order of October 8, 1979; and it is

FURTHER ORDERED, that the motion of the defendants Heldt, Snider, Raymond, Hermann, Willardson, Weigand, Thomas and Wolfe for dismissal or in the alternative for specific performance of the agreement outlined in this Court's Order of October 8, 1979, be, and the same hereby is, denied on the ground that the defendants are entitled to no relief because there has been no violation of the disposition agreement set out by the Court in its order of October 8, 1979.

(signed)
Charles R. Richey
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA :
Criminal Case
v. : No. 78-401
MARY SUE HUBBARD, et al. :

MEMORANDUM

This action is currently before the Court on the motion of all the defendants for an evidentiary hearing and for recusal. The defendants seek an evidentiary hearing on the matter of, what they term to be, the "extraordinary security precautions" surrounding the Court's conduct of the hearing on the motions to suppress in Los Angeles, California, in July of this year. The defendants contend that information recently came to their attention which strongly raises the question whether the Court concealed from counsel

the real facts surrounding the security precautions during the Los Angeles phase of the suppression hearing. In addition to their request for an evidentiary hearing, the defendants seek the recusal of this Judge on the grounds of bias, prejudice and the appearance of impropriety pursuant to sections 144 and 455 of Title 28 of the United States Code.

Turning initially to the former section, 28 U.S.C. § 144 provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard,

> or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

While the latter statute, section 455 of Title 28 of the United States Code, provides in relevant part, as follows:

> (a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings; . . ..

Generally, statutes pertaining to the disqualification of judges must be given the utmost of strict construction to safeguard the judiciary from frivolous attacks upon its dignity and integrity.

Town of East Haven v. Eastern Airlines, Inc., 304 F. Supp. 1223, 1225 (D. Conn. 1969). See Rademacher v. City of Phoenix, 442 F. Supp. 27 (D. Ariz. 1977); United States v. Moore, 405 F. Supp. 771 (S.D. W. Va. 1976); Bumpus v. Uniroyal Tire Co., 385 F. Supp. 711 (E.D. Pa. 1974).

Both sections 144 and 455 require that the request for recusal be made in a timely manner. Section 144 specically [sic] requires that the motion be made within ten days of the beginning of the term at which the proceeding is to be heard unless good cause has been shown for the failure to comply with that requirement. See Rademacher v. City of Phoenix, supra at 29; Smith v. Danyo, 441 F. Supp. 171 (M.D. Pa. 1977), aff'd, 585 F.2d 83 (3d Cir. 1978); Hall v. Burkett, 391 F. Supp. 237

(W.D. Okla. 1975). Although there is no explicit requirement of timeliness in section 455, courts have interpreted section 455 to embody such a requirement. See Bradley v. Milliken, 426 F. Supp. 929, 930 (E.D. Mich. 1977). It has been said that nothing is more important in an affidavit for bias or prejudice than timeliness. In re Union Leader Corp., 292 F.2d 381, 390 (1st Cir.), cert. denied, 368 U.S. 927 (1961). Promptness in asserting disqualification is required to prevent a party from awaiting possibly adverse decisions. Duplan Corp. v. Deering Milliken, Inc., 400 F. Supp. 497, 509 (D.S.C. 1975); see Davis v. Cities Service Oil Co., 420 F.2d 1278, 1282 (10th Cir. 1970); United States v. Conforte, 457 F. Supp. 641, n.7 (D. Nev.

1978). Russell v. Tidelands Capital Corp., 438 F. Supp. 684, 491 (N.D. Ala. 1977); Hirschkop v. Virginia State Bar Association, 406 F. Supp. 721, 724 (E.D. Va. 1975). For these reasons, if a motion for recusal is not filed in a timely manner, it is to be summarily denied. In re Federal Facilities Realty Trust, 140 F. Supp. 522, 527 (N.D. Ill. 1956).

The record in this case reveals the fact that the current motion of the defendants is untimely. On November 13, 1979, the Courtroom Clerk, at the Court's direction, notified the parties in this case that sentencing would occur on December 6, 1979. In the evening of December 4, 1979, after normal business hours, the defendants filed the motion for recusal and for an evidentiary hearing essentially based on facts which occurred in

July of 1979 -- over four months ago. In the present motion, the defendants contend that the Court is biased and prejudiced against the defendants because of security arrangements in effect while the Court heard evidence on the defendants' suppression motions in Los Angeles. Defendse counsel admit, as they are forced to admit by the record in this case, that they became aware of the security precautions at the moment of the inception of the suppression hearing on July 3, 1979. Defense counsel did not file a motion at that time contending that such precautions indicated bias and prejudice on the part of the Court. Instead, defense counsel have waited over four months, and waited to learn of the Court's decision on their motions, before raising this issue. In this motion,

the defendants have made a brazen attempt, at the eleventh hour, to invalidate each and every order entered by this Court after the Court has spent virtually an entire year resolving the never-ending volume of issues raised by the defendants in this case. By filing their motion for recusal thrity-six [sic] hours prior to the final proceeding in this case, the defendants have failed to fulfill the timeliness requirement of both disqualification statutes.

The defendants' failure is also underlined by the fact that they voluntarily waived their right to a jury trial and proceeded to trial by the Court on the basis of a stipulated record. At least one court has held that such action severely undermines a claim of bias against the Court. United States

v. Williams, 569 F.2d 823, 827 (5th Cir. 1978).

If good cause is shown for the party's failure to file a timely motion to recuse, the lack of timeliness may be excused. The burden is on the proponent of recusal to demonstrate good cause. Roussel v. Tidelands Capital Corp., 438 F. Supp. 684, 690-91 (N.D. Ala. 1977); Duplan Corp. v. Deering Milliken, Inc., 400 F. Supp. 497, 510 (D.S.C. 1975). The defendants have made no attempt to justify their failure to file this motion in a timely manner except for the conclusory claim that information has recently come to their attention. Mere conclusory allegations are insufficient to meet the statutes' requirements. See United States v. Anderson, 433 F.2d 856, 860 (8th Cir. 1970).

In order to invoke section 144 of Title 28 of the United States Code, the parties seeking recusal must file an affidavit of personal bias and prejudice. In this case, the defendants have filed a Memorandum of Law in Support of Motion for Evidentiary Hearing and for Recusal to which they have attached a "verification" signed by counsel for the defendants Heldt and Snider, Philip J. Hirschkop. This verification states:

> I, PHILIP J. HIRSCHKOP, hereby state under oath:
>
> I have reviewed the foregoing memorandum. I have tried to talk to available witnesses as to the incidents included therein. I have consulted with all co-counsel as to their understanding and knowledge of these events and their conversations with various persons regarding these events. I have reviewed all pleadings, transcripts and any memoranda pertinent to the foregoing incidents. Based on these inquiries and review, I believe the foregoing to be true.

Defense counsel have made a critical error. Section 144 states in plain terms that a party must file the affidavit of bias and prejudice. None of the parties in this case have signed such a document. Mr. Hirschkop is not a party to this action. When a motion for recusal is supported by an affidavit of one of the attorneys in the case rather than a "party," that motion is insufficient. Bumpus v. Uniroyal Tire Co., 385 F. Supp. 711, 712 (E.D. Pa. 1974); United States ex rel. Wilson v. Coughlin, 472 F.2d 100, 104 (7th Cir. 1973) (Stevens, J.). Accordingly, as a matter of law the defendants have failed to file a sufficient affidavit under section 144 of Title 28 of the United States Code.

Therefore, the only question before the Court is whether the defendants have

met the requirements of section 455, that is, that the Court's impartiality might reasonably be questioned because of a personal bias or prejudice concerning a party. In determining whether recusal is required under this section the test is whether a reasonable man would infer that the judge's impartiality is, under all the circumstances, subject to question. Bradley v. Milliken, 426 F. Supp. 929, 933-34 (E.D. Mich. 1977).

In challenging the impartiality of a judge, a party can place little reliance on the rulings and findings of the Court during the course of the judicial proceedings. See United States v. Carroll, 567 F.2d 955, 958 (10th Cir. 1977); Wolfson v. Palmieri, 396 F.2d 121, 124-25 (2d Cir. 1968 (per curium); Lazofsky v. Sommerset Bus Co., Inc., 389 F. Supp.

1041, 1043 (E.D.N.Y. 1975).

Defense counsel in this case have flatly ignored this rule. Throughout their motion, defense counsel rely on numerous rulings made by this Court during the course of these proceedings. In support of their motion for recusal and for an evidentiary hearing, the defendants rely on evidentiary rulings of the Court during during the suppression hearing, the ruling of the Court on defense access to venire information, the ruling of the Court removing the seal from documents seized from the premises of the Church of Scientology and the schedule adopted by the Court with respect to preparation of pre-sentence reports. Although the defendants may disagree with the Court's actions on these issues, their remedy is in the appellate courts.

Their disagreement with the Court's rulings cannot support their charge of bias and prejudice.

Thus, the Court must decide whether the security precautions in effect in Los Angeles would enable a reasonable man to infer that the Court's impariality [sic] is, under all circumstances subject to question. Defense counsel have not cited, nor has the Court been able to find, a single case in which security precautions have been held to be evidence of bias or prejudice. In fact, the Court is unaware of any case in which such a preposterous notion has been advanced by an attorney.

This Court finds that reasonable security precautions cannot serve as a basis for recusal. First, security precautions in criminal cases are routine.

Any holding that security precautions disqualify a judge from proceeding in criminal cases would invalidate the vast majority of criminal convictions obtained throughout the United States. Furthermore, such a holding would force judges to refuse such precautions. In our increasingly violent world, such a ruling would be no less than suicidal. In addition, the law is plain that bias and prejudice learned and acquired by the Court in its judicial capacity cannot be the basis for recusal. See United States v. Patrick, 542 F.2d 381, 390 (7th Cir. 1976), cert. denied, 430 U.S. 931 (1977). Although a person charged with a crime is entitled to presumption of innocence, there is no requirement that a judge must demonstrate his or her belief in that principle by refusing to

take reasonable security precautions. When faced with a multiple-count indictment charging serious crimes, the Court may accept reasonable security precautions without risk of tainting its rulings in a case. It is not reasonable to interpret security precautions as bias or prejudice.

Besides this obvious shortcoming the allegations of defense counsel are also insufficient because of their internal inconsistency. Defense counsel claim that there were no security precautions before the California phase of the suppression hearing and none after despite the fact that this case was pending long before and long after that proceeding. In addition, the defendants claim that such precautions were in effect in Los Angeles only twelve hours each day. If

the Court were biased and prejudiced against the defendants, and such bias and prejudice were evidenced by security precautions, why would the security precautions be in effect only during that limited period? No answer is suggested by defense counsel.

Defense counsel challenge the Court's statement that the security precautions were unrelated to this case. In support of their challenge defense counsel rely on the refusal of the United States Marshal to comment either way. The Court finds that defense counsel have failed to support their charge of deception by the Court. The law is well settled that an affidavit of bias and prejudice must be specific as to the time, place, persons, and circumstances. Berger v. United States, 255 U.S. 22,

34 (1941). Mere conclusory allegations, as are present in the current affidavit, are insufficient. Morrison v. United States, 321 F. Supp. 286, 288 (N.D. Tex. 1969), aff'd, 432 F.2d 1227 (5th Cir. 1970), cert. denied, 401 U.S. 945 (1971).

An Order in accordance with this Memorandum shall be issued of even date herewith.

(signed)
Charles R. Richey
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA :
Criminal Case
v. : No. 78-401
MARY SUE HUBBARD, et al. :

O R D E R

In accordance with the Memorandum issued of even date herewith, it is, by the Court, this 14 day of December, 1979,

ORDERED, that the motion of the defendants for an evidentiary hearing and for recusal be, and the same hereby is, denied.

(signed)
Charles R. Richey
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA

vs.

PREMISES LOCATED AT 5930
WEST FRANKLIN AVENUE,
HOLLYWOOD, CALIFORNIA

To The Federal Bureau of Investigation

Affidavit having been made before me by Federal Bureau of Investigation Special Agent Robert Tittle

DESCRIPTION OF PROPERTY

1. Memo dated 3/6/69 to Will Wilson from David Bress re: Founding Church of Scientology v. United States, No. 21,483.

2. Memo to Solicitor General from Will Wilson re No. 21,483
Petition for Certiorari recommended.

3. Memo dated 9/2/69 to the Solicitor General re: Founding Church of Scientology, Washington, D.C. discussing, inter alia, time for petition for certiorari extended to 9/15/69.

4. Memo dated 8/27/69 to Solicitor General from Lawrence Wallace re: No. 21,483.

5. Memo dated 9/15/69 to Joseph Hannon from Thomas Flannery re: No. 21,483.

6. Letter dated 7/23/70 to Will Wilson from Thomas Flannery re: United States of America v. An Article or Device (E-Meter case).

7. Letter dated 9/9/70 to Flannery from William Goodrich, Food and Drug Administration, re: E-Meter case, Civ. No. 1-63.

8. A file consisting of seven (7) pages labelled: A-F 21-126 File, described further as follows: Brown paper with a file number and the date 6/[illegible]73; copy of letter (1 page), 3/1/73, from FDA to non-federal agency; copy of letter (4 pages) 9/8/72, from individual to non-federal law enforcement official.

9. Letter dated 7/5/71 to Miss Raymonde I. Paul from Pearl Emily Harlan.

10. Letter dated 7/16/71 to Rev. Mrs. Beth Fordyce from Pearl Emily Harlan.

11. Letter dated 10/27/71 to Miles W. Kirkpatrick from Pearl Emily Harlan.

12. Letter dated 2/6/72 to Joseph Hannon from Cyril Vosper.

13. Letter dated 6/4/73 to Joanne Sisk from Van Miller.

14. Memo dated 7/5/63 to files from ELP re United States v. Hubbard.

15. Memo dated 3/26/64 to files from JMH re: Hubbard, etc.

16. Letter dated 3/29/69 to Nathan Dodell from Ralph R. Rash.

17. Letter dated 6/19/69 to Nathan Dodell from Ralph R. Rash.

18. Letter dated 7/24/69 to Ralph R. Rash from Joseph Hannon.

19. Letter dated 2/1/74 to James H. Estabrook from Arnold Aikens.

20. Letter dated 2/20/63 to Robert F. Kennedy from G. Franklin Montgomery.

21. Letter dated 3/27/67 to M.J. Ryan from John I. Lacey.

22. Letter dated 3/29/67 to John I. Lacey from Ernest L. Brisson.

23. Letter dated 5/17/71 to Thomas M. Brown from Bernard T. Loftus.

24. Letter dated 2/13/63 to David Acheson from William W. Goodrich re: Civ. No. 1-63.

25. Memo dated 2/13/63 to Director, Baltimore District from Inspector Paul Lankford. re: Scientology -- Annual Reports.

26. Memo dated 4/23/63 to Director, Detroit District from Inspector E.A. Maciejewski.

27. Memo dated 6/17/65 to Director, Chicago District from Inspector Robert W. Case.

28. Memo dated 1/13/75 to Edward Hidalgo from Simon Bourgin re: California Church posing as U.S. Information Agency.

29. File containing the three-page typed statement of Emylee Lynne Miller dated 21 October, 1974 in a Defense Communications Agency file entitled "Walk-in Informant".

30. Church pleading in Civil Action 75-1471, Founding Church of Scientology of Washington, D.C. v. Simon -- the Affidavit and attachments of Louis B. Sims.

31. A sheaf of approximately forty documents labelled "Documents denied in entirety"

comprised of correspondence between and among members of INTERPOL requesting and transmitting information concerning L. Ron Hubbard and Scientology.

32. Memo dated 4/22/75 to file from Louis B. Sims re: Interview by Vaughn Young of 4/21/75.

33. A small sheaf of approximately ten documents labelled "partially disclosed on 5/9/75" comprising correspondence between and among members of INTERPOL requesting and transmitting information concerning L. Ron Hubbard and Scientology.

34. Letter dated 10/17/75 to James Stotter II re: Scientology cases from Na+han Dodell.

35. A document entitled "Evaluation of: Narconon New Life, 827 Beacon Ave., Los Angeles, Calif. 90017, dated October 31, 1974.

36. Memo dated 11/25/58 to files from Edward P. Troxell re: Scientology. Report of Inspectors Joseph R. North and Richard H. Wilkins.

37. Memo dated 12/2/58 to files from Troxell re: L. Ron Hubbard, Scientology, etc.

38. Memo dated 1/7/59 to files from Troxell re: Scientology, etc.

39. Memo dated 1/15/59 to Oliver Gasch from Troxell re: Scientology, L. Ron Hubbard.

40. Memo dated 1/15/59 to Oliver Gasch from Troxell re: Scientology, L. Ron Hubbard and the College of Mental Science, Arthur Jay Green, Dean, 7426 - 13th St., N.W., Washington, D.C.

41. Copy of letter dated 1/28/59 to Oliver Field, M.D. from Zigmond M. Lebensoh, M.D.

42. Memo dated 3/16/59 to files from Troxell re: Ernest Alsvary.

43. Memo dated 11/3/58 to Roy E. Blick from Capt. Ernest P. Jefferson re: Investigation of Lafayette Ron Hubbard and the various Hubbard Foundations.

44. Letter dated 7/25/58 to Roy E. Blick from Saleem Alam Shah, Ph.D.

45. Memo dated 11/18/58 to File from March Lehman re: Dr. L. Ron Hubbard.

46. Confidential Memo of the Metropolitan Police Department, dated 1/11/59, Narcotic Squad, Washington, D.C., re: Alsvary.

47. Memo dated 3/11/59 of Metropolitan Police Narcotic Squad to files re: Hubbard Investigation -- Alsvary.

48. Memo dated 3/12/59 to files from Troxell re: Scientology.

49. Memo dated 3/16/59 to files from Troxell re: Ernest Alsvary.

50. Memo dated 3/31/59 to files from Troxell re: Alsvary.

51. Letter dated 11/20/58 to Robert Morrison from Oliver Gasch re: L. Ron Hubbard.

52. Letter dated 11/20/58 to David D. Furman from Oliver Gasch re: L. Ron Hubbard.

53. Letter dated 11/20/58 to Thomas D. McBride from Oliver Gasch re: L. Ron Hubbard.

54. Letter dated 11/20/58 to Harold K. Wood from Oliver Gasch re: L. Ron Hubbard.

55. Letter dated 11/20/58 to Wilbur G. Leonard from Oliver Gasch re: L. Ron Hubbard.

56. Letter dated 11/25/58 to Gasch from Joseph L. Cohen re: OG:EPT:acs.

57. Letter dated 11/26/68 to Gasch from Louis C. Bechtle re: United States v. Kish, et al.

58. Letter dated 12/15/58 to Gasch from Robert Carpenter re: Investigations of Hubbard Institute-Freudian Foundation.

59. Letter dated 1/7/59 to Gasch from Andrew A. Salvest re: L. Ron Hubbard.

60. Letter dated 4/3/59 to Gasch from Wilbur G. Leonard re: Hubbard Dianetic Foundation, Inc., Bankruptcy 379 B 2.

61. Letter dated 2/9/53 to Eugene Davis from Lynn R. Brodrick re: Hubbard Dianetic

Foundation, Inc.

62. Letter dated 4/7/59 to Gasch from George T. Van Bebber re; Hubbard Dianetic Foundation, Inc.

63. A file labelled Longo Test Correspondence.

64. Memo dated 3/16/59 to Chief, Baltimore District from Inspector Taylor M. Quinn, re: Sunday night meeting of Founding Church of Scientology.

65. Memo dated 3/18/59 to Chief, Baltimore District from Inspector Taylor M. Quinn, re: visit to Academy of Scientology for Purpose of Signing up for a Course.

66. Memo dated 3/19/59 to Files from Troxell re: Mr. Quinn, FDA.

67. Memo dated 3/20/59 to Chief, Baltimore District from Quinn re: Tests taken at Academy of Scientology on afternoon of 3/20/59.

68. Memo dated 3/23/59 to Chief, Baltimore District from Quinn re: first day of HAS course at Academy of Scientology.

69. Memo dated 3/24/59 to Chief Baltimore District from Quinn re: second day of HAS course at Academy of Scientology.

70. Memo dated 3/25/59 to Chief Baltimore District from Quinn re: third day of HAS course at Academy of Scientology.

71. Memo dated 3/26/59 to Chief Baltimore

District from Quinn re: fourth day of HAS course at Academy of Scientology.

72. Memo dated 3/27/59 to Chief Baltimore District from Quinn re: fifth day of HAS course at Academy of Scientology.

73. File Captioned Col. Routledge.

74. Memo to files dated 2/16/59 from Seymour Raboy, Metropolitan Police Department Narcotic Squad re meeting of Founding Church of Scientology on 2/15/59 at 1812 - 19th St., N.W.

75. Memo to files dated 2/22/59 from Joseph W. Somerville, MPD Narcotic Squad re Founding Church of Scientology meeting 2/22/59 at 1812 - 19th St., N.W.

76. Memo to files dated 3/2/59 from Seymour Raboy, MPD Narcotic Squad re Founding Church of Scientology meeting 3/1/59 at 1812 - 19th St., N.W.

77. MPD Narcotic Squad inventory dated 1/15/59 of books and documents turned over to Dr. Inez Wilber.

78. Memo to files dated 2/9/59 from Troxell re: Scientology.

79. Memo dated 2/11/59 to Troxell from E. Riley Casey re: Definition of Religion and Religious Society ....

80. Memo dated 2/10/59 to Gasch from Troxell re: interview of Dr. William G. Frank.

81. Memo to files dated 3/11/59 from Troxell re: Interview with Inman H. Douglas.

82. Undated eleven-page memo to Deputy Chief Roy E. Blick of Morals Division, Metropolitan Police Department, re Scientology and Jefferson.

83. Undated three-page memo to Blick re: Scientology and Jefferson.

84. Memo to files dated 1/27/59 from Troxell re: Scientology, Jefferson and Longo.

85. Memo dated 3/3/59 to Blick re: Scientology.

86. Letter dated 8/12/59 to Troxell from M.L. Milstead of Health, Education and Welfare.

87. HEW seven-page Inspection Report dated 6/2/59, re: E-Meters, signed by Fred Shallit.

88. Letter dated 11/28/58 to Troxell from Zigmond M. Lebensohn, M.D.

89. Letter dated 4/29/59 to Theodore Wiprud from Lebensohn.

90. One page document dated 4/19/57 captioned Information from Mrs. Theodore Peck, JE2 0367.

91. Letter dated 4/29/57 to Theodore Wiprud from Lebensohn.

92. Letter dated 4/30/57 to Peck from Lebensohn.

93. Letter dated 4/25/57 to Theodore Wiprud from Paul Foley.

94. Letter dated 1/29/59 to Gasch from Oliver Field of American Medical Association.

95. Letter dated 1/11/59 to Gasch from Richard J. Plunkett, of AMA.

96. Memo to files dated 12/2/58 from Troxell re: L. Ron Hubbard.

97. Memo to files dated 12/10/58 from Troxell re: Scientology.

98. Memo to files dated 1/7/59 from Troxell re: Scientology, etc.

99. Memo to files dated 2/9/59 from Troxell re: Scientology.

100. Letter dated 1/26/76 to Robert Elliott from James Stotter II re: Church of Scientology of California v. United States Department of Justice, CV 74-3550.

101. Memo dated 1/23/76 to J.F. Axelrad from Robert Elliott re: Church of Scientology v. Drug Enforcement Administration.

102. Memo dated 12/18/75 to file from Stotter re: Church of Scientology v. DEA.

103. Letter dated 12/17/75 to Chief Rocky Pomerance from Richard C. Clement.

104. Memo dated 12/15/75 to Figley from Elliott re: Church of Scientology of

California v. United States Department of Justice, CV 74-3550.

105. Five letters dated 12/12/75 from U.S. Marshal in the Southern District of New York enclosing subpoenas for Church of Scientology of California v. U.S. Department of Justice, CF 74-3550 for the following persons: James Taylor, Vernon J. Calhoun, William J. Baum, Lawrence G. Waldt, Rocky Pomerance.

106. Cable dated 12/11/75 to DEA in Paris re: Church of Scientology v. DEA from Bruce Jensen.

107. State Department telegram dated 12/8/75 to DEA in the District of Columbia from the American Embassy in Paris.

108. Memo dated 12/10/75 to Special Authorizations Unit from Donald Miller.

109. Memo of Conversation dated 6/27/75 re: FOI: Information Received from the GOC in Confidence.

110. Aide-Memoire from Canadian Embassy dated 6/27/75.

111. Eight (8) letters dated 11/20/75 to the following persons from Henry Dogin, DEA: Francois le Mouel,

93. Letter dated 4/25/57 to Theodore Wiprud from Paul Foley.

94. Letter dated 1/29/59 to Gasch from Oliver Field of American Medical Association.

95. Letter dated 1/11/59 to Gasch from Richard J. Plunkett, of AMA.

96. Memo to files dated 12/2/58 from Troxell re: L. Ron Hubbard.

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David Dilley, Vernon J. Calhoun, William Baum, Robert Bermingham, Rocky Pomerance, James Taulor, Lawrence Waldt.

112. Cable dated 10/8/75 from Secretary of State in Washington, D.C. to Paris and London Embassies.

113. Memo dated 10/6/75 to Stotter from Elliott re: testimony Church of Scientology of California v. U.S. Department of Justice, CV 74-3550-F.

114. Letter dated 9/26/75 to Mouel from Dogin.

115. Letter dated 9/4/75 (in French) to Dogin from Devaudan (plus the translation into English).

116. Cable dated 10/8/75 from American Embassy in Paris to Secretary of State in Washington re: deposition of French official in Church of Scientology of California v. U.S. Department of Justice, CV 74-3550.

117. Memo dated 6/17/75 to Susan M. Hauser from Bruce Jensen re: George Bristol III.

118. Letter dated 5/29/75 to Bruce Jensen from George Bristol III.

119. Memo dated 4/16/75 to Attorney General from Director, FBI, re: Freedom of Information Act.

120. Memo dated 4/11/75 to Axelrod from Richard Lavine re: Church of Scientology v. Department of Justice, CV 74-3550.

121. Letter dated 1/10/75 to Carla Hills from John Bartels re: case 74-3550-F.

122. List of Department of Justice Civil Diyision Attorneys (new assignment of case sheet).

123. Memo dated 4/2/75 to U.S. Attorney from Irving Jaffe re: Civ. 74-986.

124. Memo dated 3/11/75 to Assistant Attorney General (Attn: Axelrad) from Director FBI re: 74-906.

125. Eighteen-page letter dated 3/12/75 to Hills Attn: Leathers from Hugo Ranta re: Church of Scientology v. Kelly, Civ. 74-906.

126. Six-page memo dated 8/6/74 to Assistant Attorney of Civil Division from Director FBI re: Church of Scientology v. Kelly, Civ. 74-906.

127. Memo dated 6/25/74 to files from Axelrad re: 145-12-2158.

128. Handwritten note on lined legal sized paper headed "Do we concur in filing Motion for SJ".

129. Memo dated 11/1/75 to Figley from James Stotter II re: Church of Scientology v. Postal Service Civ. 75-2004-R.

130. Letter dated 10/17/75 to Figley re: Church of Scientology v. Postal Service, Civ. 75-20040R, from Charles Hawley.

131. Letter dated 11/21/75 to James R. Eooley from Thomas J. Ramsey.

132. Memo (undated) to Mr. Leigh from Henry Kissinger.

133. Memo dated 11/23/70 to Carl E. Stone from Special Investigator, ATF, re Church.

134. Telex dated 11/20/70 to Director, ATF, Washington, D.C. from ATF Seattle re: Steven Heard.

135. Memo dated 12/16/75 to Files from James Stotter II re: Church of Scientology California v. Department of State, Civ. 75-2562-F.

136. Undated fourteen-page memo to Stotter from Tom Ramsey re: Church of Scientology California v. Department of State, Civ. 75-2562-F.

137. Letter dated 12/19/75 to Axelrad from Norman B. Lynch.

138. Two-page letter dated 4/6/76 to Figley from Guy H. Cunningham re: Church of Scientology California v. Energy Research Development Administration, Civ. 76-11-R.

139. Document dated 2/16/76 and captioned "LITIGATION CONCERNING SCIENTOLOGY FOIA REQUEST".

140. Memo dated 4/22/68 to Clement Pallazzo from John C. Fleming re Dale C. Musser.

141. Memo dated 2/27/67 to W. R. Adair from Pallazzo re Hubbard Association of Scientologists International.

142. Letter dated 5/23/68 to J. E. Hoover from Earl F. Lane re: Hubbard College of Scientology.

143. Letter dated 8/9/68 to Fleming from Adair re Hubbard College of Scientology . . . .

144. Letter dated 4/21/68 to U.S. Atomic Energy Commission from Musser.

145. Letter dated 3/26/76 to Cunningham from H. E. Lyon re: Church of Scientology FOIA Request.

146. Memo dated 12/24/75 to Rex Lee from J. Axelrad re Possible Government Defense of "Harrassment" in FOIA cases.

147. Letter dated 1/19/76 to Dear Sir: from Lorna Levett.

148. Three-page report of statement made by Emylee Lynne Miller on 21 October 1974 to Defense Communication Agency

(DCA) employees and reported on DCA Form 341. (This report may have a cover sheet bearing the seal of the DCA stamped "Confidential" or "Highly Sensitive" or "Secret".)

149. Synopsis of Gerald Wolfe's June 10, 1977 Grand Jury testimony.

150. Memorandum, notes or report prepared by Richard Weigand on or about June 12, 1976 relating to Gerald Wolfe, Michael Meisner, about a surreptitious entry into the United States Courthouse building in the District of Columbia.

151. Any notes, memoranda, or reports prepared by Michael Meisner and/or Gerald Wolfe relating to their entry into the United States Courthouse on or about June 11, 1976 and their confrontation with two FBI agents on that date.

152. Guardian Order 1361.

153. Guardian Order 1634.

154. Any and all Guardian Orders issued pursuant to Guardian Order 1634 which would be identified as Guardian Order 1634-(number).

155. A Guardian Order generally identified as "Snow White".

156. Any and all Guardian Orders issued pursuant to the Guardian Order generally identified as "Snow White" which would be identified by the mention of "Snow White".

157. Any and all documents contained in the Operations Files concerning Robert Snyder.

158. Any and all documents of the Internal Revenue Service relating to the Church of Scientology Calif. marked "Confidential, GO 1361 Material". (This would include the Hawaii and California cases.)

159. Any and all documents attached to a memorandum from Mitchell Herman identified as "Mitch" or Michael Meisner identified as "Mike".

160. Any and all memoranda written by Michael Meisner identified as "Mike" making reference to attached government documents.

161. Any and all documents marked "Non-FOI".

162. Any and all fruits, instrumentalities, and evidence (at this time unknown) of the crimes of conspiracy, obstruction of justice and theft of government property in violation of 18 U.S. Code §§ 371, 1503 and 641 which facts recited in the accompanying affidavit make out.

SOURCE OF DOCUMENTS

Items 1-99 lists documents stolen (and copied) from the office of Assistant United States Attorney Nathan Dodell, United States Attorney's Office for the District of Columbia.

Items 100-148 lists documents stolen (and copied) from the office of Staff Attorney Paul Figley, Department of Justice, Washington, D.C.

Items 100-122 are documents relating to the case of Church of Scientology of California v. United States Department of Justice, CV 74-3550-F.

Items 123-127 are documents relating to the case of Church of Scientoloty of California v. Kelly, Civil Action 74-906.

Items 128-130 are documents relating to the case of Church of Scientology of California v. Postal Service, Civil Action 75-2004-R.

Items 131-132 are documents relating to the case of Church of Scientology of California v. State Department, Civil Action 75-2832 AAH.

Items 133-134 are documents relating to the case of Church of Scientology of California v. Alcohol, Tobacco and Firearms, Civil Action 75-1699 RFP.

Items 135-136 are documents relating to the case of Church of Scientology of California v. Department of State, Civil Action 75-2562E.

Item 137 is a document relating to the case of Church of Scientology of California v. Department of Transportation, Civil Action No. 75-3482.

Items 138-147 are documents relating to the case of Church of Scientology of California v. Energy Research and Development Administration, Civil Action No. 76-11R.

AFFIDAVIT IN SUPPORT OF SEARCH WARRANT

The affiant states that during the course of an investigation into unauthorized entries into the United States Courthouse for the District of Columbia, the use in those entries of fraudulently obtained false Internal Revenue Service identification cards bearing the seal of the United States Department of the Treasury, the theft of government property, as well as a conspiracy to commit such unauthorized entries, the affiant learned the following:

1. From a review of the pleadings and related documents in United States v. Gerald Bennett Wolfe, D.C.D.C. Crim. No. 77-283 (Flannery, J.), as well as evidence in support of that criminal case, including the affidavit in support of the arrest warrant for Michael Meisner, U.S. Mag. No.

1101M (Cr.) (D.D.C. August 5, 1976), the physical evidence and reports of the Federal Bureau of Investigation:

In May and June 1976, two individuals, on three occasions, entered the United States Courthouse in the District of Columbia using false Internal Revenue Service credentials. These two individuals on the second occasion were confronted while making surreptitious use of the United States Attorney's Office xerox machines. These are located in an area which is off-limits to the general public. On the third occasion they were stopped by Federal Bureau of Investigation Special Agents on the third floor of the Courthouse which houses the United States Attorney's Office and the District of Columbia Bar Library. One of the two individuals identified himself

as Thomas Blake and the other as John Foster. Both had IRS identification cards. However, when Foster was asked about his current employment he stated that he was no longer working at IRS. Subsequent investigation by the FBI revealed that neither identification card had been legitimately issued by the IRS. The individual who carried the Blake identification was in fact Gerald Bennett Wolfe, an IRS clerk-typist. He was subsequently arrested on June 30, 1976. The other individual who accompanied Wolfe in each of the Courthouse entries was identified as Michael James Meisner. A warrant for Meisner's arrest was issued by a United States Magistrate on August 5, 1976. On May 13, 1977, Wolfe entered a plea of guilty to false use of a government seal (18 U.S.C. §1017) in the United States District Court for the

District of Columbia. On June 10, 1977, Wolfe was sentenced and immediately thereafter appeared before the Grand Jury. On June 20, 1977, Assistant United States Attorney Garey G. Stark was contacted telephonically from Los Angeles by an individual who identified himself as Michael Meisner and who stated that he wished to return voluntarily to the District of Columbia, and cooperate with the United States. Meisner arrived in Washington that evening.[1/]

1/ Meisner requested and received for an indefinite period twenty-four-hour witness protective custody under an assumed name from the United States Marshal's Service. See Allard v. Church of Scientology of California, 129 Cal.Reptr. 797, cert. denied, 97 S.Ct. 1101 (1977), which discusses the Church's "fair game" doctrine. That doctrine requires the Church to attack and destroy its enemies, "suppressive persons" and those, like Meisner, who leave the Church.

2. The affiant states that he was present during extensive interrogations of Meisner over a two-week period. Mr. Meisner described the criminal acts committed by himself and others on behalf of the Founding Church of Scientology. These criminal acts involve violations of, inter alia, 18 U.S.C. §371 (Conspiracy), 18 U.S.C. §1503 (Obstruction of Justice); and 18 U.S.C. §641 (Theft of Government Property). During this period of questioning Mr. Meisner stated the following:

The Founding Church of Scientology was established in the early 1950's by L. Ron Hubbard who remains the highest official in the Church.[2/] The Church is organized

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2/ The affiant has read transcriptions of a television program and a confidential interview of former Scientologists conducted by the IRS. The affiant states that Meisner's description of the Church, its organiza-

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into two main divisions -- the "Sea Organization (so-called because it was originally based on ships at sea) has its headquarters in Clearwater, Florida. Its main function is to administer the day-to-day operations of the various churches and missions in the United States and abroad. The Guardian's Office, on the other hand, is charged with the overall protection of Scientology --

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(Fn. Cont.)
tional structure, its programs and purposes find corroboration in public statements made by Lorna Levett, a dissident Scientologist, on the "ABC News Closeup" television broadcast of September 2, 1976 entitled "New Religions: Holiness or Heresy?" The affiant also states that Meisner's description finds more detailed corroboration in a lengthy transcription of a taped interview with a couple referred to as "Ira and Kathy", likewise dissident Scientologists. The interview was conducted by a Special Agent of the IRS on December 27, 1973. Like Meisner, "Ira and Kathy" held sensitive positions of high responsibility within Scientology.

the safeguarding of the environment within which the Church exists. The chief officer of the Guardian's Office is Mary Sue Hubbard, L. Ron Hubbard's wife. The "Guardian Office World-Wide" is located in East Grinstead, Sussex, England, and exercises overall supervision over subsidiary Guardian offices located elsewhere about the world. It is headed by Jane Kember, the "Guardian World Wide." [See Appendix I.] It is divided into five bureaus -- Information, Public Relations, Legal, Finance and Social Coordination. The United States subsidiary of the Guardian's Office is located at Fifield Manor, 5930 Franklin Avenue. Hollywood, California, and is headed by Henning Heldt. It in turn exercises supervision over all the Guardian Offices throughout the United States. [See Appendix II.] The Deputy Guardian for Information handles all in-

telligence matters, including covert operations to acquire government documents critical of Scientology, covert operations to discredit and remove from positions of power all persons whom the Church considers to be its enemies; and internal security within the Church itself. Michael Meisner has been an active member of the Church of Scientology since 1970. Soon after joining, Meisner became a staff member of the Church and has since held various positions, eventually rising to a high level of responsibility. Beginning in January 1974, Meisner was the Assistant Guardian for Information in the District of Columbia. [See Appendix II.] As such, Meisner had direct access to extremely sensitive Church documents -- originating at the very highest level of the Church in England and the

United States -- which authorized the implementation of a policy of infiltration of government agencies and elimination of individuals who were considered enemies of the Church. During his tenure in Washington, Mr. Meisner often visited the Guardian's Offices in Los Angeles to attend meetings with Henning Heldt, Richard Weigand and other top officials. From mid-June until the end of August, 1976, Mr. Meisner held the position of National Secretary, a post immediately under the supervision of Weigand, the Deputy Guardian for Information in the United States. [See Appendix I.] In that position, Mr. Meisner had access to all the Guardian Offices files in Los Angeles and was one of only five individuals in the United States who had access to the most sensitive documents of the Church of Scientology.

THE CONSPIRACIES TO STEAL GOVERNMENT PROPERTY AND TO OBSTRUCT JUSTICE

In early 1974 Guardian Order 1361 (GO 1361) was issued by Guardian World Wide Jane Kember. GO 1361 called for an all-out attack on the Internal Revenue Service [3/] which was to include the filing of law suits, a public relations assault, as well as the actual infiltration of the IRS by agents of the Church. In order to implement that operation, the Guardian's Office in L.A. decided in the summer of 1974 that a member of the Church should be recruited and planted as an agent within the National

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3/ The affiant has ascertained from officials of the Exempt Organizations Section of the IRS that it had, from time to time, withheld tax-exempt status from certain church subsidiaries, unsatisfied that they met relevant criteria.

Office of the IRS in Washington, D.C. Cindy Raymond, a member of the staff of the Deputy Guardian for Information, Mitchell Hermann, who was then responsible for covert activities in D.C., and Meisner were assigned the task of recruiting such an individual. They each interviewed persons for that post and discussed the results of these interviews. Eventually in the fall of 1974 Cindy Raymond informed Meisner and Hermann that she had recruited one Gerald Bennett Wolfe for the purpose of infiltrating the IRS, and that Wolfe would be coming to D.C. and applying for a clerk's position at IRS. By November 1974 4/ Wolfe

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4/ Meisner advised affiant that on November 1, 1974, Mitchell Hermann, and an emissary from the Deputy Guardian for Information in L.A. who used the pseudonym Don Alverzo surreptitiously entered the IRS building and placed a listening device in

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obtained a position as clerk-typist at IRS. Soon thereafter, Wolfe complained that he was unable to obtain some of the sought-after documents. In order to determine whether Wolfe was making excuses for his failures or that access to IRS files was

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(Fn. Cont.)
a conference room which they knew was about to be used for a high-level IRS meeting on the Church of Scientology. That meeting was to include among others, representatives of the Audit Section, the Exempt Organizations Section, and the Intelligence Division. Mitchell Hermann who overheard the conversation being bugged, told Meisner what he had overheard. Two or three months later Meisner read a transcript of the tape secretly produced. Meisner observed that transcript in the Information Bureau files then located at Fifield Manor. Meisner recalled for affiant that the transcript revealed a discussion of the need for communication between the various units of the IRS which were investigating the Church and a discussion of future plans for dealing with the Church. Independant investigation consisting of an interview with Joseph Todesco, Director, Exempt Organizations Division of the IRS, confirms that there was such a meeting on November 1, 1974.

difficult, Meisner and Hermann entered the IRS building during a weekday, went into an office in the Exempt Organization Branch and took a file relating to Scientology out of a filing cabinet. The file was taken out of the IRS building, xeroxed and returned by Hermann to the position from which it was taken the next morning.

In March 1975,[5/] after Mitchell Hermann's departure from D.C., Meisner took over the supervision of all covert Scientol-

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5/ From December 1974 to March 1975 Hermann directed several burglaries of the offices of Barbara Bird, an attorney in the Refund Litigation Division of the Chief Counsel's office. Meisner was kept informed of the results of these burglaries by Hermann inasmuch as Meisner was the highest intelligence officer in the D.C. Scientology organization. [Bird was known to be involved in Scientology cases.]

ogy agents within government agencies. This included direct supervision of Wolfe's activities at IRS and on numerous occasions Meisner accompanied Wolfe into the IRS building after working hours for the purpose of breaking into offices and copying documents. These activities included:

(1) From March to June 1975 several incursions, most by Wolfe alone and one jointly with Meisner, into the office of Lewis Hubbard, an attorney in the Chief Counsel's office[6/] for the purpose of copy-

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6/ Independent investigation by representative of the United States Attorney's Office consisting of a conversation with Warren Bates, an Assistant Commissioner of the Internal Revenue Service has revealed that during 1975 one Lewis Hubbard was indeed an attorney in the Office of the Chief Counsel of the IRS.

ing all records relating to the audit of the Hawaii Scientology organization. Upon receipt of the xeroxed documents, Meisner sent copies to the Los Angeles Guardian's Office where additional copies were distributed to Henning Heldt, Richard Weigand, Larry Rose - Deputy Legal Guardian until June 1975, Mary Heldt - Deputy Guardian for Finance, and Martin Greenburg - the CPA-US. These were marked "Confidential, GO 1361 Material". Subsequently, Meisner, while in the L.A. offices, observed these same documents with the above-described distribution list attached.

(2) In June 1975, after the Hawaiian organization's exemption was approved by IRS, an audit was begun of the California Scientology organization. Wolfe was instructed by Meisner to continue a weekly

monitoring of all files in Lewis Hubbard's office.

(3) Beginning during the summer of 1975 Wolfe was directed by Meisner to monitor the files of the Exempt Organizations offices.

Among those whose files Wolfe reviewed and xeroxed were: Jeanne Gessay, Chief of Ruling Section One; Muriel Moritz who worked with Gessay; Assistant Commissioner Alvin Lurie; Deputy Assistant Commissioner Theodore Rademaker; Special Assistant to the Assistant Commissioner Charles Rumph; Technical Advisor Howard Schoenfeld; and Director Joseph Tedesco. These offices were checked by Wolfe on a weekly basis from the fall of 1975 until June 1976. On several of these occasions

Meisner accompanied Wolfe.[7]

Another surreptitious entry into a government building occurred in July 1975 when Meisner instructed Wolfe to obtain all material relating to pending Scientology cases against IRS from the Tax Division of the Justice Department. To that end, Wolfe made approximately four visits to the Star Building in the District of Columbia[8] -- a Justice

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7/ These represent only a few of the break-ins and surreptitious entries into the IRS building conducted by Meisner and Wolfe. In every instance copies of the documents obtained were filed in the D.C. Ass't Guardian Information office as well as sent to the Deputy Guardian for Information in Los Angeles. Assistant Commissioner Bates has confirmed that, in 1975, Gessay, Moritz, Lurie, Rademaker, Rumph, Schoenfeld and Tedesco did indeed hold the positions indicated by Meisner.

8/ Affiant has ascertained from Justice Department attorneys that the Star Building does indeed house offices of the Tax Division of the Department of Justice.

Department Annex housing some of the Tax Division offices -- copied approximately two inches of documents. All these documents were turned over by Wolfe to Meisner who filed copies in the D.C. Information office files and sent other copies to L.A.

In December, 1975 Cindy Raymond, the Collections Officer within the Deputy Guardian for Information, U.S. Office, developed a "program" calling for covert operations designed to obtain Interpol documents regarding the Church of Scientology contained in files held by government agencies.[9/] That program was devel-

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9/ Prior to the establishment of "Sea Organization" headquarters in Clearwater, Florida, this international policy-making arm of the Church was quartered in sea-going vessels which, from time to time, sought docking privileges in various ports. Frequently, Mediterranean port authorities

(Fn. Cont.)

oped in response to the general directive contained in Guardian Order [GO] 1634 composed and disseminated by the Guardian Office World-Wide. All documents not turned over to the Church by the government pursuant to an FOIA request were to be covertly obtained by agents of the Church, according to the Raymond program. That program was to be implemented in the District of Columbia either by burglarizing the targeted

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(Fn. Cont.)
declined to extend such privileges, suspecting illicit activities on what were thought to be "mystery ships," since the Church disguised their true ownership. Church leaders thought Interpol the international police agency, to be responsible for these difficulties. As a result, Church leaders sought from Interpol documents in its possession critical of the Church. Initially, attempts were made to burglarize offices of Interpol maintained in the U.S. Treasury Department in Washington, D.C.

office or by placing a secure Scientology agent on the staff of the targeted government attorney. This agent would have access to the attorney's files and would xerox the sought-after documents and turn them over to Meisner, who supervised the activities of all Scientology covert agents in Washington, D.C.

In furtherance of that program, Meisner determined that he should place a Scientology agent within the office of Department of Justice Attorney Paul Figley who was then handling the Scientology Freedom of Information suit against Interpol. Meisner recruited one Sharon Thomas, a church member, and directed her to apply for a secretarial position within the Justice Department.* She succeeded, initially as a

/ Meisner states that before Thomas could (Cont.)

secretary across the hall from Figley's office and thereafter as Figley's personal secretary. As a result of Thomas work, Meisner learned in February 1976 that the overwhelming majority of the sought-after Interpol documents were not in Figley's possession. Meisner learned that Assistant United States Attorney Nathan Dodell in the United States Attorney's Office in the District of Columbia, whose office was located on the third floor of the United States Courthouse within that District, was the Assistant U.S. Attorney primarily handling Freedom of Information Act cases involving the Church. However, during Thomas' association with Figley,

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(* Cont.)
be placed at the Justice Department he had to obtain approval in writing from Richard Weigand and Cindy Raymond. He sent to them requests in writing and they responded by telex.

she took material from Figley's files, as well as Interpol files, and delivered them to Meisner. Meisner recalls that, among these materials were documents relating to Scientology-instituted FOIA suits against, inter alia the Central Intelligence Agency, the Drug Enforcement Administration, Customs, Interpol and the Defense Communications Agency. Meisner filed copies of all such documents in the Washington Information Bureau files and sent copies to the L.A. Information Bureau for filing, together with a summary cover memorandum. The originals were then returned by Thomas to the files in Figley's office.[10/]

10/ Independent investigation, consisting of interviews of Mr. Paul Figley by representatives of the United States Attorney's Office for the District of Columbia, has

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Sometime in March 1976, Meisner and Wolfe entered the IRS building after hours using Wolfe's legitimate IRS credentials. Once inside, they broke into the room in which the equipment used to make identification cards was located and made themselves false identification cards using

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confirmed that one Sharon Thomas was indeed his secretary during 1976 and that he, Figley, was responsible for defense of FOIA suits brought by the Church and maintained appropriate files.

During the past week, Mr. Meisner, accompanied by representatives of the U.S. Attorney's Office for the District of Columbia, has visited Mr. Figley's office and inspected his files. Meisner identified files and specific documents which he recalled copying. A list of all such documents is appended to this affidavit, denominated "Description of Property."* On at least one occasion during the past week, Meisner was shown the outer cover of a confidential Defense Communications Agency file which he remembered having copied and was asked to describe its contents. He did so accurately.

* and listed as items 100-148.

fictitious names. These credentials were initially made for use in a covert operation involving one Robert Snyder, a newscaster critical of the Church. However, when it became evident that the Interpol Freedom of Information documents were in AUSA Dodell's office, Meisner and his immediate superiors decided to use these credentials to enter the United States Courthouse in view of the tight security within that building.

On a weekday during the first week of May, 1976, Meisner and Wolfe entered the Courthouse building at approximately 4:00 P.M. Because the entry was prior to

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* / Prior to putting the plan of entering the U.S. Courthouse in effect, Meisner states that he discussed the whole matter with Cindy Raymond, who initiated the program, and Mitchell Hermann. He later kept them advised of his progress on a regular basis.

6:00 P.M., neither had to sign-in in any book although they both had to show identification. Wolfe used his legitimate IRS identification card while Meisner showed a false IRS identification card in the name of J.M. Foster. They both proceeded to the third floor which houses the United States Attorney's Office as well as the District of Columbia Bar Association Library. Meisner and Wolfe went to the library and waited until after working hours. They then began to wander around the floor in an attempt to locate the office of AUSA Nathan Dodell. Eventually the office was located in a small hallway connected to the back of the above-mentioned library by a door which was always left open. The Dodell office was separated from the rest of the U.S. Attorney's Office by a double door that remained closed. On

the inside of that door is also located an elevator for court personnel, one of two used after working hours and on weekends.

Upon locating the office, Meisner and Wolfe attempted to open the door leading into AUSA Dodell's suite of offices with a metal device used in the past for that purpose. However, they met with no success.

Approximately two to three days later, Wolfe was sent back into the U.S. Courthouse during his lunch hour in order to find a means of entering AUSA Dodell's office and found both Dodell and his secretary gone. On top of the secretary's desk was a set of keys. Wolfe took those keys, called Meisner to inform him of that find, then met with Meisner in front of the courthouse to show him the keys. Meisner and Wolfe had four of those keys, which resembled the

type used in government buildings, duplicated at a locksmith on Columbia Road, N.W., between 18th and Champlain Streets, N.W. Then Meisner and Wolfe returned to the Courthouse and dropped the keys in the corridor outside Dodell's office, expecting that when found Dodell's secretary would assume they fell out of her purse.

On May 21, 1976, Meisner met Wolfe at approximately 7:00 P.M. outside the IRS building in the District of Columbia and drove in his car to the U.S. Courthouse. That evening Wolfe signed-in using his own IRS identification card and Meisner signed-in as J.M. Foster using his false IRS credentials. They were permitted to sign-in after the guard had called the D.C. Bar Librarian and obtained permission from him to allow Meisner and Wolfe to use the li-

brary. They then obtained from the government guard at the building's entrance a key to one of the after-hours elevators.

Meisner and Wolfe proceeded to the third floor using the elevator next to Dodell's office, then went into the D.C. Bar Library through the back entrance, and signed-in on the library log as J. Wolfe and J.M. Foster.[11/] Ten minutes later they went to Dodell's office through the back of the library and, after trying the keys they had duplicated, they found the one that opened the door. That door opened into a small room -- the secretary's office -- which in turn led through an open door to

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11/ This is corroborated by the D.C. Bar Library sign-in logs as well as by the admission of Gerald Wolfe at the time he plead guilty on May 13, 1977.

Dodell's office. Upon entering Dodell's office they proceeded to review three drawers full of various types of files maintained in the course of FOIA litigation instituted by the Church.

After skimming through these files, they located the sought-after Interpol file as well as a general file on Scientology violations, and some Scientology files containing documents obtained from the D.C. Police Department. Meisner and Wolfe placed some ten to twelve files in their respective briefcases and went back through the library, then into the main third-floor hallway to the xerox machines of the United States Attorney's Office. Over the next two hours they xeroxed a five-inch stack of documents which they had obtained from AUSA Nathan Dodell's

office. They then returned these files back to Dodell's office and left the Courthouse sometime around 11:00 P.M. Meisner drove Wolfe to his car and agreed to return to the Courthouse and Dodell's office on May 28. He then went on to his office at the Church at 2125 S Street, N.W., and placed the xeroxed documents there. He then called Los Angeles and reported to Richard Weigand, Deputy Guardian for Information (intelligence) in the U.S., that he had obtained the Interpol file. Weigand had been involved in the preparation of that covert operation. Over the next few days, Meisner reviewed these documents and sent them to his superiors with cover memos explaining their content. Each memo was signed "Mike" by him. Copies of these documents with cover memoranda were sent by

Meisner to:

1. The Deputy Guardian-Information Office, U.S. in Los Angeles, in the person of Mitchell Hermann who was the Secretary for the Southeast Area which included the District of Columbia with the understanding that he would forward a copy to the Deputy Guardian-Information Office, World Wide in East Grinstead, Sussex, England;

2. Mary Sue Hubbard, the second person in command of the Church and the highest authority in the Guardian's Office, in Clearwater, Florida.

One copy was retained in the office of the Assistant Guardian for Information in the District of Columbia, located on the fourth floor of 2125 S Street, N.W.[12/]

12/ Investigation by the Federal Bureau of Investigation at the Church of Scientology in the District of Columbia has confirmed that Miesner held such a position at the time in question. This investigation was conducted subsequent to the events of June 11, 1976, while Meisner was a fugitive.

On Friday, May 28, 1976, Meisner met Wolfe once again in the parking lot behind the IRS building after working hours and they proceeded to the U.S. Courthouse. Wolfe signed-in at the guard's desk using the name of "Haack" or "Hoake", showing an identification card which he had borrowed from a fellow-employee at IRS. Meisner signed-in as J.M. Foster, again using his false IRS credentials. Once again they obtained from the guard an elevator key and signed for it. 13/

13/ This is corroborated by the Courthouse sign-in logs for May 28, 1976, which show that at 7:30 P.M. one "Haack" and a J.M. Foster signed-in, noting that they were going to the D.C. Bar Library. They signed out at 9:55 P.M. It is also confirmed by Wolfe's acknowledgment in open court at the time of his plea.

Meisner and Wolfe proceeded to the third floor using the same elevator used the first time and went directly to AUSA Dodell's office. Once again Meisner and Wolfe filled their briefcases with Scientology files from Dodell's filing cabinets. They then went through the United States Attorney's Office hallways to the area where the xerox machines were located. This time Meisner and Wolfe each used one xerox machine and for the next one and one-half hours proceeded to copy a stack of documents slightly larger than the five-inch one of May 21.*

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*/ Mr. Meisner reviewed the files of AUSA Nathan Dodell in the presence of a representative of the United States Attorney's Office, and identified those documents listed as items 1-00 in the "Description of Property" appended to this affidavit as being documents he and Wolfe took from Dodell's office and xeroxed.

They then returned through the D.C. Bar Library intending to re-enter AUSA Dodell's office through the back of the library. They were, however, stopped by the librarian who wanted to know why they had failed to sign-in. When he apparently failed to receive an adequate response he went to call a building guard. Meisner and Wolfe took advantage of the librarian's temporary disappearance and returned to Dodell's office to return the files they had taken to their lawful place. As they were preparing to leave the third floor, Meisner and Wolfe were confronted by a building guard who informed them that they could not use the U.S. Attorney's Office xerox machine, the guard also directed them to print their

names on a piece of paper.[14/]

Following his evaluation of the documents obtained from AUSA Dodell's office on May 28, Meisner determined that one more covert entry would be necessary to complete copying the remaining Scientology-related documents. Meisner was also instructed by Mitchell Hermann that on the next entry into AUSA Dodell's office he was to obtain any personal information about Dodell which he could find. The purpose for that information, Meisner was told by Hermann, was to implement a Church operation which had been instituted to remove Dodell from his govern-

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14/ The Federal Bureau of Investigation has confirmed these events through interviews of the D.C. Bar Library evening librarian as well as the building guard.

mental position because he was considered a threat to the Church.

On June 11, 1976, Meisner once again met Wolfe at the IRS parking lot, parked his own car, and drove to the U.S. Courthouse in Wolfe's car. The latter's car was parked across the street from the only open entrance in the evening - on John Marshall Place. This time Wolfe signed-in at the guard's desk as Thomas Blake and Meisner as John M. Foster. Both used the false credentials they had made during their IRS break-in. They also once again obtained an elevator key.[15/] This time, however, the building guard inspected more closely the identifi-

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15/ Wolfe acknowledged these events at the time of his plea in U.S. District Court, as well as in testimony before a United States Grand Jury.

cation presented by Meisner and Wolfe inasmuch as he recognized them as the two individuals involved in the May 28 incident. Moreover, the building guard had, during the intervening two weeks, reported the May 28 incident to the U.S. Attorney's Office and the Federal Bureau of Investigation had been called to look in to the matter. Meisner states that he and Wolfe then proceeded to the third floor using an elevator on the opposite side of the building from the one they had used on the two previous occasions. Upon entering the library, Meisner showed the night librarian a written authorization to use the library which he had earlier received from the day librarian. Meisner and Wolfe then had to wait approximately twenty minutes while a cleaning lady completed work-

ing in AUSA Dodell's office. As they were waiting, two FBI agents who had been alerted by the building guard about the presence of Meisner and Wolfe arrived and aborted the planned burglary of Dodell's office. FBI Special Agents Dan G. Hodges and Christine Hansen questioned Meisner and, upon being told that he was not employed by the IRS, seized his credentials in the name of John M. Foster. The agents confirmed the employment of a Thomas Blake at the IRS. Wolfe, thus, was permitted to retain his card in Blake's name. Meisner and Wolfe were then permitted to leave the building.

Meisner stated that he and Wolfe proceeded down the staircase to the first floor and, after giving up their elevator key, left the building. They then proceeded to take a circuitous route on foot in order

to shake any potential pursuer. When assured that they were not being followed, they took a taxicab to Billy Martin's Tavern at the Southwest corner of Wisconsin and N Street, N.W. Once there, Meisner placed a telephone call to Mitchell Hermann at the Guardian's Office in Los Angeles and informed him in a cryptic manner that a major development which required urgent action had occurred. Meisner was given the number of an outside phone to call and he placed the call a few minutes later. During that second call he told Hermann what had just occurred. Hermann directed Meisner to wait and call back within one hour inasmuch as he, Hermann, had to consult Richard Weigand, the Deputy Guardian for Information. Herman also instructed Meisner and Wolfe to begin writing a narrative of the circumstances leading to

their confrontation with the FBI. Meisner informed Wolfe of these instructions and then called the Church of Scientology at 2125 S Street, N.W., and spoke to Bruce Ullman, his deputy who was in charge of internal security, and Joseph Alesi, another deputy in the Information Bureau. Meisner told them about the developments and instructed Alesi to come to the restaurant. Both Ullman and Alesi were cognizant of the plans to penetrate Dodell's office.

When Alesi arrived at the restaurant he was directed by Meisner to go back to the U.S. Courthouse and pick up Wolfe's car. Meisner also instructed Alesi to contact his wife and have her pick up Meisner's car at the IRS and bring it to Georgetown. Meisner then called back Hermann in Los Angeles and was told that

Weigand wanted him in L.A. for debriefing the next morning. Meisner also directed Ullman to bring him money from the D.C. Church the next morning at the Quality Inn motel at 1190 North Courhouse Road in Arlington, Virginia. Meisner then went there with his wife, Patricia, and stayed there overnight.[16/]

Meisner states that on June 12, at approximately 8:30 A.M., he was driven to National Airport where he took a United Airlines flight to Los Angeles under a fictitious name, paying for the ticket with the cash brought to him by Ullman. Upon his arrival in L.A., Meisner went to the Church's Guardian Office headquarters

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16/ Motel records indicate that one "Pat Meisner" rented a room on June 11, 1976 for one night and that the room was vacated on June 21 at 8:31 A.M.

at Fifield Manor, 5930 Franklin Avenue, Hollywood, California, where he was taken to Weigand's office to type out the report he had been directed to prepare about the Courthouse incident. That report was read by Weigand and his deputy Greg Willardson in Meisner's presence. It was then taken to Henning Heldt, the Deputy Guardian for the United States -- the highest officer of the Church in the United States. Meis- then met with Weigand and Willardson to determine how to handle the Courthouse break-ins and any ensuing Federal Bureau of Investigation action. Two proposals were considered. One involved sending Wolfe to the District of Columbia with a prepared cover-up story as to why he was in the Courthouse in order to see what the authorities would do. Under that plan

Meisner would be sent to D.C. after legal action was completed with Wolfe. Meisner would also be instructed on what to say. Neither would admit any association with the Church of Scientology nor acknowledge having broken into AUSA Dodell's office. The second plan revolved around sending both Meisner and Wolfe to D.C. at the same time and let them both accept whatever punishment was meted out, again always denying any association with the Church. After these two plans were discussed at length, Meisner was told by Weigand to stay at the Holiday Inn in Hollywood. It was also decided to summon Wolfe to L.A. immediately. Meisner received money for that purpose from Peter Alvet, the Information Bureau Establishment Officer -- the individual who handles

financial matters for the Information Bureau. That meeting concluded at approximately 7:00 P.M. and Meisner went to the Holiday Inn where he signed in under a fictitious name.

The next day, Sunday, June 13, at approximately 10:30 A.M., Weigand, Willardson and Meisner met with Henning Heldt and his deputy Duke Snider at Fifield Manor. Both plans were outlined to Heldt in Meisner's presence. Heldt tentatively rejected both plans and directed Weigand, Willardson and Meisner to consider a third plan -- not sending either Meisner or Wolfe back to D.C. on the theory that, with no bodies present, the Government's investigation into the Courthouse incident would flounder. Heldt stated in no uncertain terms that no plans, including

a cover-up story, were to be executed without his specific approval. Weigand, Willardson and Meisner returned to Weigand's office to continue their strategy meeting. It was decided that plan one, which involved sending Wolfe to D.C. first and later sending Meisner, should be recommended to Heldt. During those discussions, the outlines of a cover-up story which Wolfe and Meisner were to give the FBI and any grand jury were also discussed and approved for recommendation to Heldt. Weigand wrote the proposal and the cover-up stories in longhand and gave it to his secretary Janet Finn, who then typed it. While the document was being typed, Mitchell Hermann, who had participated in some of the discussions and was being kept briefed on the developments, came into the meeting and informed those present that Wolfe was enroute to L.A. Meisner personally read the document,

then Weigand stated that he would take it to Heldt for his approval. Within one-half hour Weigand returned and told Willardson and Meisner that Heldt and Snider had approved the plan. The plan as approved required preparing a detailed cover-up story for Wolfe and Meisner. Wolfe would be initially sent back to the District of Columbia where, if investigated or apprehended, he would tell his cover story and stick by it through all legal proceedings. Wolfe would feedback to the Church officials in L.A. what was happening in D.C. Once these proceedings were completed, Meisner would be sent back to D.C. with his parallel cover story. Mitchell Hermann was to return to D.C. with Wolfe and serve as his Church contact during the course of

any investigation or legal proceedings. The meeting then terminated with the understanding that more meetings would be held the next day after Meisner changed his appearance.

On Monday, June 14, Janet Finn visited Meisner at the Holiday Inn, cut and dyed his hair and gave him money to buy contact lenses to replace his eyeglasses. Meisner also shaved his moustache. Thus it was hoped that if a warrant was issued for his arrest, he would be able to evade the authorities. Meisner then went to an optometrist and purchased contact lenses. 17/

17/ Dr. Gerald Nankin of 6611-1/2 Hollywood Boulevard, Hollywood, California, has supporting documents which confirm that Mr. Meisner was at his office for the stated purpose.

At approximately 2:00 P.M., Wolfe arrived with Weigand and Willardson at Meisner's hotel room and the cover stories were developed. Then all the participants proceeded to drill Wolfe on the specifics to make sure he could stick by it. It was also agreed that Wolfe should be given an attorney upon his arrival in D.C. and Mitchell Hermann was directed to find an attorney who would be sufficiently reliable to go along with the cover story created by the Church. Wolfe was also directed to call his superiors at IRS to inform them that he would not be in the next day and at the same time found out if the FBI had been inquiring about him.

If questioned in D.C., Wolfe was to state that he had accidentally met Meisner, whom he only knew as John Foster, at

a local bar and struck up a conversation. He was to add that Foster was a law student and that he became interested in Foster in the hope that Foster would teach him legal research so that he, Wolfe, could obtain a better-paying job. Wolfe was to say that he and Foster met on some three or four occasions always setting up meetings from week to week. Then one evening Wolfe and Foster had met in Georgetown and had become inebriated; that they had gone to visit the IRS building while drunk; once there they had found the identification room unlocked and that they made identification cards as a lark. Then Wolfe was to meet Foster on three occasions to be given legal research lessons, that on each occasion they went to the D.C. Bar Library

in the U.S. Courthouse to use law books, and that they used their respective false identification cards to gain access to the library facilities. Meisner's cover story was to run along the same lines as Wolfe's story. He was to tell authorities that he had never told his real name to Wolfe and that Wolfe was to assist him in research about the exempt organization statutes of IRS. Meisner was to confirm that at no time was Wolfe a church member.

In furtherance of the plans agreed upon in L.A. on June 12-14, Wolfe was returned to D.C. where he was arrested by the FBI.[18/] Meisner states that he was

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18/ Records of the Office of the United States Attorney for the District of Columbia indicate that Wolfe was offered a plea to a misdemeanor with six months maximum jail exposure in return for his

(Fn. Cont.)

informed by L.A. church officials that Wolfe, following his testimony went to the Church offices in D.C. where he was debriefed concerning his Grand Jury testimony. On Tuesday, June 14, 1977, approximately four days after Wolfe's Grand Jury appearance, Meisner read in L.A. a 15-page synopsis of Wolfe's testimony before that Grand Jury.*/

(Fn. Cont.)
cooperation. However, he rejected that offer and chose to plead guilty to the false use of a government seal (18 U.S.C. 1017) -- a felony carrying a five-year maximum jail sentence. Then on June 10, 1977, following his sentencing, Wolfe was subpoenaed before a District Court grand jury where he testified under oath to the exact same facts prepared for him on June 12-14, 1976 in L.A.

*/ Within the Information Bureau U.S., Meisner was known under the code name "Herbert" and Wolfe was known under the code name "Silver". These two code names had additional meanings; "Silver" also meant the Internal Revenue Service, and "Herbert" meant the situation in Washington which arose out of the June 11, 1976 incident. Files on both code names are maintained in the Information Bureau files in Los Angeles.

After June 14, 1976, Meisner was named National Secretary of the Church of Scientology and maintained an office at the Guardian's Office in L.A. However, when the Church discovered that a warrant had been issued for his arrest in D.C., he was removed from any official position with the Church, while retaining functions in an unofficial capacity. This situation continued until sometime in April 1977 when Meisner indicated that he was tired of waiting and wished to be sent back to D.C. as soon as possible. When Meisner threatened to take the situation in his own hands, he was placed under twenty-four-hour guard and was repeatedly "audited"[19/] by the Church. On one

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19/ "Auditing" is a process designed to effect mind-control its use dated back to the founding of the Church and is essential to the indoctrination of all would-be Scientologists.

occasion he was removed from one building to another handcuffed and gagged. On another he was apprehended by church members in Las Vegas and returned under their custody to Los Angeles where he was again placed under house arrest. It was explained to him that this action was taken in his own interest and the interest of Scientology and that in due time he would be returned to his position of responsibility within the Church. Throughout that time no attempt was made to close off from him channels of information about the Church's activities and indeed his advice was often sought. This is evidenced by the fact that as late as June 14, 1977, he was given the memorandum on the debriefing of Wolfe after his Grand Jury appearance. However, on June 20, 1977, Meisner contacted the United States Attorney's Fraud Division

and stated that he had escaped from the Church and wished to come to the District of Columbia, face criminal charges, and cooperate in the on-going investigation of the burglaries of the offices of the United States attorney.[20/]

20/ Meisner has been represented by counsel since his arrival in Washington on June 21, 1977. He has been granted no immunity from prosecution and undersands that immunity will not be offered him by the Government. Meisner has agreed to enter a plea of guilty to a felony carrying a maximum term of imprisonment of five years.

NATURE AND LOCATION OF DOCUMENT FILES MAINTAINED BY THE CHURCH OF SCIENTOLOGY

Michael Meisner has advised affiant that the guardians' offices and their operational and administrative bureaus in the Church of Scientology have maintained files containing documents reflecting all activities of the Church and all external references to the Church since the inception of the Guardian's Office in 1966. Meisner explained that these files are kept both to facilitate operations of this large organization which experiences significant personnel fluctuation and also to provide a permanent history of matters touching upon the Church. Meisner stated that he has personally observed, both in Washington, D.C. and Los Angeles, California, documents carefully filed and indexed which reflect activities of years ago.

Meisner advised affiant that a fundamental principle about which all Church staff personnel are well trained is that recordation and retention of records is essential to an on-going "memory bank" which, in turn, is essential to Church operation and security.

Meisner has told affiant that the primary depository of documents for Scientology in the United States is the Information Bureau in Los Angeles, California. The documents were accumulated by FOIA actions and covert Scientology operations against various United States agencies; those documents gathered through legitimate, non-covert channels are marked "FOI" and those obtained by covert actions are marked "non-FOI." (The distinction is noted so that Church officials can be certain which documents can safely be disclosed for public purposes.) Covertly

obtained documents are those obtained either through outright burglaries or theft by Scientology agents who work for government agencies. Most of those covertly obtained during the period 1975-76 in the Department of Justice are accompanied by a cover memorandum (which can be identified by the signature "Mike") from Michael Meisner, describing the attached document. Some documents covertly obtained prior to March 1975 are accompanied by a memorandum from Mitchel Hermann, signed "Mitch."

The Information Bureau documentary material is divided into six file systems:

(a) two file systems consisting of covertly and overtly obtained documents which deal with individuals and groups. These two categories, which together constitute the main Information Bureau files, are filed

alphabetically in approximately 250 file cabinets.

(b) Another category of files is called the "government special bank" which includes only those documents the majority of which are "non-FOI" obtained from the government. Some of the files contained in the "individual" and "group" filing cabinets would also be in the "government special bank" if they were obtained from the government. The "government bank files" are contained in approximately ten filing cabinets of four to five drawers each.

(c) In addition to the three files described above to which rather free access is permitted, two files of strictly limited access are maintained:

(1) The "program files" which are maintained by the Programs Officer and are

available to only ten people -- among them were the Deputy Guardian for Information, his deputy, the five area secretaries, and the National Secretary. These are always kept in the office of the Programs Officer. These "programs" are high level policy directives written by the stuff of the World-Wide or United States Guardian Officer and approved by Guardian World-Wide. A program outlines a plan of action which is to be accomplished and then lists the individual steps which are to be taken to accomplish it. Most programs are multi-bureau in nature and therefore are supervised by the Deputy Guardian's Office itself. All activities in the Guardian's Office are conducted pursuant to "programs"; immediate access to these files is absolutely essential to the daily operations since no orders can be issued without them.

(2) The operations files, which contain all reports prepared to implement an operations activity. "Operations" are covert activities directed against "enemies" of Scientology. The operations files include all reports which discuss the information gathered from an operation and the result of the operation. When these reports of operations are placed in the individual or group files they are purged of any information potentially incriminatory of the Church of Scientology. The operation files are accessible only to five people -- the Deputy Guardian for Information, his deputy, the National Secretary, the National Operation Officer and the National Branch I Director; these files are always kept in the offices of the National Operations Officer.

(d) The confidential file of the

Deputy Guardian for Information (U.S.) which contains documents of extreme sensitivity. Direct access to this file is limited to the Deputy Guardian for Information and his secretary. These highly sensitive documents are primarily of an organic nature, such as Guardian Orders and programs written by L. Ron Hubbard. It also includes reports written by the Central Intelligence Agency in South America (in particular Ecuador and Bolivia) concerning Interpol agents believed to be involved in drug dealings. Those documents were obtained from Nancy Douglas, a Scientology agent who had obtained employment at the Drug Enforcement Administration. She, in turn, gave them to Meisner, her contact, who sent them with a cover memo to Mitchell Hermann, the Southeast U.S. Secretary in Los Angeles.

These files are maintained in a safe and a file cabinet which are always kept in the office of the Deputy Guardian for Information, Greg Willardson at the Cedars/Sinai complex.

During the summer of 1976, after the District of Columbia U.S. Courthouse entries had been detected, Meisner was sent to Los Angeles and given the position of National Secretary for Information. In the course of those duties he read materials taken from virtually all United States Guardian Office Information Bureau files.

In July, 1976 Meisner approached Peggy Tyson (the Information Programs Officer U.S.) and asked her for all programs related to his position as National Secretary. Tyson opened her program files file cabinet (located directly next to her desk)

and pulled out about two feet of file folders.

At this time the U.S. Information Bureau was located in Glendale, California on Cerritos Street.

The file folders he was given included some programs directed against governmental agencies: GO 1361 (IRS), Snow White, GO 1300 (Coast Guard), GO 1634 (FOI actions), GO 1634+0 (Information Bureau activities re FOI), and others.

Tyson was known to Meisner for some time as the Information Programs Officer. In February, 1976, he was in Los Angeles for a period of about three weeks. During that time he spoke with Tyson 3-4 times about the Information Bureau DC's progress on various programs. In February, 1976 Tyson again had her program files (which

she referred to during their conversation) next to her desk. At this time her office was located at Fifield Manor in Hollywood, California, on the 7th floor.

In July, 1976 when Tyson first moved into the Glendale office she had her desk positioned near the front door. She remained in this position only for about a week before moving her desk to the rear of the building. This first week she also had her program files directly next to her desk. Thus, every time he has seen Tyson's office area he has noted that she keeps her program files directly next to her desk.

To the best of Meisner's recollection, her file cabinet is light grey with a pushbutton lock in the top right hand corner of the cabinet.

Meisner recalls first seeing the Operations file cabinet in the summer of 1975.

At that time the cabinet was in an office on the 7th floor of Fifield Manor in Hollywood. This office was shared by Bruce Raymond (Operations Officer US) and Gary Lawrence (Deputy Operations Officer US). At that time, Lawrence pulled from the Operations files the files pertaining to the American Medical Association and Council of Better Business Bureaus Operations.

In February of 1976 the Operations file cabinet was located in a different office on the 7th floor of Fifield Manor, but again, next to Bruce Raymond's desk. At this time Meisner trained Bruce Raymond on the theory of operations and they referred to various operations files during the drilling.

When the Information Bureau was moved to Glendale in July, 1976, Bruce Raymond

again located the Operations file cabinet directly next to his desk. Meisner referred to these files about once every week or two over the summer of 1976 in the regular course of Scientology duties. Every time he has entered Bruce Raymond's office he has observed that the Operations file cabinet, secured by a bar lock, was located next to his desk.

In the summer of 1975 the Government Special Bank was maintained in a small alcove between the DG Info's Office and the office of the CIC section, on the 7th floor of Fifield Manor in Hollywood. At that time it consisted of about four file cabinets. Meisner had reasons to check these files for some information on the IRS. John Lake was responsible for the upkeep of these files and had his desk located

next to the alcove in which they were stored.

In February, 1976 the Government Special Bank was still located in this alcove. He was required to pull all files related to the Postal Service from the Government Special Bank.

In the summer of 1976 the Government Special Bank was located in the Information Bureau Offices in Glendale and consisted of about 10 file cabinets (grey, with push button locks) located near the center of the warehouse-office in Glendale. Meisner consulted these files 2-3 times a week through the summer of 1976.

The Deputy Guardian for Information (U.S.) retained all documents that he considered of extreme sensitivity, in a safe and safe-file cabinet in his office.

In February, 1976 Meisner was ordered

to go over "operations" theory with Bruce Raymond and drill him so that he understood it and could apply it. It was necessary for him to use two sensitive Guardian Orders (GO's) written by L. Ron Hubbard. These GO's were kept in the Deputy Guardian for Information's safe-file cabinet. Dick Weigand (the Deputy Guardian for Information) told his secretary, Janet Finn, to open the safe file cabinet and give Meisner the GO's, which she did. The safe-file cabinet was located at that time in a small closet next to Janet Finn's office and Dick Weigand's office, on the 7th floor of Fifield Manor in Hollywood. Several hours later, Meisner returned the GO's to Janet Finn and watched her replace them in the safe-file cabinet.

In July, 1976 he was again required

to go over these GO's and requested permission of Dick Weigand to view them. At this time the safe-file cabinet was located in one corner of Dick Weigand's office in Glendale, California. Finn opened the cabinet and gave Meisner the GO's.

Near the end of August, 1976, Meisner required access to some reports by the CIA dealing with Interpol. These reports were contained in a small cube safe located in a corner of Dick Weigand's office. Meisner obtained Weigand's permission to have access to these documents and he instructed Janet Finn to open the safe. Meisner watched as she opened it and noted that the inside contained no file folders, but simply loose documents. She took out about 4-5 inches of CIA reports and gave them to him. Meisner retained these documents for

about two days and then returned them to Finn and watched as she replaced them in the safe.

Access to the safe and safe-file cabinet was limited to Weigand and Finn. When Meisner first requested access to the CIA documents, Finn and Weigand were unavailable. He spoke with Greg Willardson (Weigand's Deputy), who told him that only Finn and Weigand had the combinations to the safes and he would have to get Weigand's express permission to obtain any materials from the safes. From his observation, the safe and safe-file cabinet were always kept within the D.G. Info's Office.

In January 1977 Meisner was told by David Moore about the impending purchase of the Cedars-Sinai hospital complex near

Sunset and Vermont in Hollywood, Moore told him that when the purchase was complete the Information Bureau would probably be the first Scientology section to move in as their present quarters were far more desirable. Moore said that the Information Bureau would be moved into a large suite of offices immediately behind the big reception area located in the middle of the building on the first floor. Moore said that entrance into this suite of offices was to be gained through one door off the reception area.

Around February, 1977 the purchase was announced and was carried on all the local TV news channels.[21/]

21/ Independent investigation conducted by Special Agents of the Federal Bureau

(Fn. Cont.)

During March, 1977 Meisner was told by three different individuals, at different times, that the Information Bureau had moved into the Cedars complex. These individuals were David Moore (an auditor, and Information Bureau student), Brian Andrus (then Southeast U.S. Secretary), and Cindy Raymond (then Acting National Secretary). On this occasion, Moore also told Meisner about a security problem in relation to the Information Bureau because access to the Bureau could be gained through the boiler room.

As previously indicated, Information Bureau files are the memory of the organization and essential to the continuing activi-

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(Fn. Cont.)
of Investigation in Los Angeles over the past several days, consisting of physical observation, confirms that the Church of Scientology occupies the old Cedars of Lebanon Hospital and prominently displays its name at all corners of the property.

ties of the Information Bureau. Ub all Information Bureaus that he has visited, the files were never separated from the personnel. It is noteworthy that when the Information Bureau felt that the files had to be moved out of GO Headquarters in the summer of 1976, not only were files personnel moved out with the files, but all Information personnel followed the files, particularly the individual, group and government special bank -- indicating the necessity for being near the files on the part of all Information personnel.

When he was told that the Information Bureau had moved into Cedars, it was clear to him that the main files had also been moved into Cedars. This was later confirmed.

About April 10, 1977 (at the beginning of Meisner's being placed under guard), Meisner spoke with John Lake who was the

Director of CIC and responsible for the files. In a casual conversation about many things (Lake and he had been friends and co-workers in Scientology since 1971), they talked about Lake's job and he told Meisner how it was much easier moving the files this time as it was better organized. Lake stated that all the files had been moved into Cedars; that there was a great deal more room for all concerned and for the files section in particular; that the files were spread over several rooms; that some of the files had been put in small cubicles off the hallways but there was some problem with the building codes and having the cabinets in those cubicles.

From about the beginning of June, 1977 until June 20th, when Meisner left Los Angeles, one of Meisner's daily guards

was Chuck Reese -- an Information Bureau employee working in CIC, the files section.

On a number of occasions Reese, who was aware of the fact that Meisner knew the Information Bureau files and personnel had moved into the Cedars building, would talk about his work in the files; how boring it was; that he had considered getting a house closer to Cedars; and how it was much nicer working in Cedars than in a warehouse. He told Meisner explicitly many times that the Information Bureau files were in the Cedars building.

The last time Meisner spoke with Reese was on a Sunday afternoon, June 19. At that time Reese again stated that the files were in Cedars and that the filing was becoming quite backlogged.

Reese also explained that the Infor-

mation Bureau was the only group present in the Cedars building and that other GO Bureaus or Scientology organizations would not move in for at least a couple of months.

The operations, programs, and sensitive files were always kept within the possession of the Operations Officer, National Programs Officer, and Deputy Guardian Information, respectively. These files were considered as essential to these individuals as the main files were essential to the GO as a whole. Meisner was told specifically by David Moore and Brian Andrus in March, 1977 that the Deputy Guardian Information's Office in Cedars was a nice-looking, almost luxurious office. Cindy Raymond, likewise, told Meisner that Bruce Raymond (Operations Officer)

Peggy Tyson (Programs Officer) and other specific individuals were able to have separate offices due to the large amount of room in Cedars.

The Deputy Guardian U.S.' office, located on the sixth floor of the Fifield Manor, contains copies of all program files from the various GO Bureaus. The Deputy DGUS is charged with the responsibility of administering these programs and delegates most of the responsibility to the Programs Officer U.S. The primary officials are:

Deputy Guardian U.S. - Henning Heldt and

Deputy DGUS - Duke Snider

Programs Officer U.S. - Betsy Hirsch (as of August, 1976)

In February, 1976 Meisner was in Duke Snider's office and was speaking to Snider

about how he liked being responsible for programs, as opposed to more active roles he had played in the past. At the time, Snider was looking through program files that he had taken from a file cabinet near his desk.

In July, 1976 the Deputy Guardian U.S. program files, along with the program files of the other GO Bureaus, were moved into the Information Bureau office in Glendale. The move resulted from fears that due to the sensitive nature of the files and possible government interest resulting from a Customs seizure of mail matter, the files would be too accessible to the government if they remained in GO headquarters.

Meisner learned that the files moved from the Deputy Guardian U.S. and other offices from Judy Taussig, the Security

Officer in the U.S. Information Bureau. It was through Taussig that the files had been moved to the Information Bureau offices.

Meisner also knew that these were the Deputy Guardian U.S.' programs files because of the frequent requests from persons in the Deputy Guardian U.S. office for various files from the cabinets. While the Information Bureau had an outside office in Glendale, courier runs were set up to deliver written communications between the Information Bureaus and Fifield Manor. Non-Information Bureau personnel were not allowed in the Information Bureau office, so that every time a file was needed from the Deputy Guardian U.S. program files, a note had to be sent with the courier that identified the file needed. The courier

then had to search through the program files, find the correct file, and bring it back to Fifield Manor. Meisner heard the courier, Chris Mixer, complain often about the large number of requests from the Deputy Guardian U.S.' office for program files.

In late August, 1976, Meisner was told by Judy Taussig that these program files had been returned to the offices on the sixth floor to the Deputy Guardian U.S. and other Bureau offices at Fifield Manor. This was in response to his asking her what had happened to them as they were obviously missing from their location in the Information Bureau.

At this point (August, 1976), then, the Deputy Guardian U.S. program files were in the offices of Henning Heldt, the Deputy

Guardian U.S.' offices have remained in Fifield Manor to this date, Meisner having been told by Church officials as late as mid-June of this year that any further moves into Cedars were at least two months away.

With respect to the files maintained in the headquarters of the Founding Church of Scientology located in Washington, D.C., Meisner has advised affiant that documents similar to those maintained in files in Los Angeles are filed in the Offices of the Information Bureau, D.C. Indeed, since many of the government agency documents maintained in Los Angeles were acquired through the efforts of D.C. operatives, and since copies were always retained in the D.C. Bureau, copies of the self-same documents are filed in both locations.

The filing system differs in that there is no distinction between group-

related documents and government documents. Rather, all documents are filed alphabetically, by agency.[22/] Meisner states that all the government documents thus filed are the product of covert operations with the exception of two packets of materials which, together, comprise a stack of documents no more than one-inch high. These two packets consist of Department of Justice bulletins relative to the terms of the F.O.I.A. prepared for distribution to the public and a small collection of air-grams which the De-

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22/ The agencies represented in these files include the exempt organizations and international operations divisions of the Internal Revenue Service, the Tax Division of the Department of Justice, the United States Attorney's Office for the District of Columbia, the Coast Guard, the Drug Enforcement Administration and the Central Intelligence Agency. Individual files are maintained on Mr. Tedesco, of the IRS, Mr. Figley of the Department of Justice and Mr. Dodell of the U.S. Attorney's Office.

partment of State produced pursuant to an F.O.I.A. request (this latter collection is filed under a cover memo authorized by Meisner describing the means of its acquisition).

Meisner advises that these files are maintained in approximately ten file cabinets in the Church Offices at 2125 S Street, N.W., Washington, D.C.

The Washington copies of the program files maintained by the Information Bureau, D.C., on the other hand, take up but a single file drawer; the operations files occupy two drawers.

Meisner advises that in late June, 1976, Mitchell Hermann told Meisner that all of the above files had been moved from 2125 S Street, N.W. to an apartment shared by Jay Armstrong and Patty Pease (two staff members, Information Bureau, D.C.) on Cal-

ifornia Street, N.W., shortly after Meisner and Wolfe had been confronted by the FBI agents in the Courthouse. After one week, Meisner was told, the files were moved to a house rented by Bruce Ullman and Joseph Alesi (Information Bureau, D.C. staffers).

In February, 1977, Brian Andrus became Southeast Secretary of the Information Bureau U.S. As such part of his responsibility was to oversee the situation in Washington arising out of the confrontation of Wolfe and Meisner by the FBI on June 11, 1976. In this capacity Andrus met weekly from February to June, 1977 with Meisner much the same as Meisner had earlier met with Wolfe on a weekly basis in Washington to discuss their work together. These conversations with Andrus were of a general nature and often included discussions about the Information

Bureau in Washington. In late March, 1977, during one of these conversations Meisner asked Andrus whether Washington was still maintaining two Information Bureau offices, whether the files were still in the same house with Alesi and Ullman. Meisner was informed that the files had been returned to the office of the Assistant Guardian for Information at 2125 S Street, N.W. Inasmuch as Andrus was Southeast Secretary of the U.S. Information Bureau he had to know of this move because only he could have ordered it.

Meisner has told affiant that, within 2125 S Street, N.W., the Assistant Guardian's suite of offices is located on the fourth floor, rear, access to which is gained by a separate staircase. Within this suite of offices are offices of the

Information Bureau, D.C. The approximately ten file cabinets are kept within these offices of the Information Bureau.

3. Based on the foregoing, affiant submits that there is probable cause to believe that, from 1974 through 1976, officials of the Church of Scientology in Los Angeles, California and in Washington, D.C. conspired to steal documents from the Government of the United States by means of the burglary of U.S. Government offices and theft by operatives of the Church in the employ of the U.S. Government; that documents belonging to the United States Government were stolen pursuant to that conspiracy; that copies of such stolen documents are secreted in the files of the Church of Scientology in Los Angeles, California, and Washington, D.C.; that subsequent to the confrontation between Messrs.

Meisner and Wolfe and agents of the F.B.I. on June 11, 1976, officials of the Church of Scientology conspired to obstruct justice by preparing a false response to expected inquiries of Meisner and Wolfe by law enforcement authorities and federal grand juries; that plans, scenarios and directives were committed to writing in furtherance of this conspiracy; that such writings are secreted in the files of the Church of Scientology in Los Angeles, California, and Washington, D.C.; that the objects of this latter conspiracy were met in part before a Grand Jury of the United States District Court for the District of Columbia on June 10, 1977; that, thereafter a summary of Wolfe's Grand Jury testimony was prepared by him in furtherance of the objectives of this

latter conspiracy; and that copies of that summary are secreted in the offices of the Church of Scientology in Los Angeles, California, and Washington, D. C.

WHEREFORE, affiant requests the issuance of Search Warrants for the premises described above authorizing searches for the items described above, which items are either fruits, instrumentalities of evidence of the crimes of conspiracy, obstruction of justice, and theft of Government property set forth in this affidavit.

/S/ ROBERT TITTLE
ROBERT TITTLE
Special Agent, Federal
Bureau of Investigation

Sworn to and subscribed before me this 7th day of July, 1977

/S/ JAMES J. PENNE
UNITED STATES MAGISTRATE
For the Central District of California

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1981

Criminal No. 78-401

79-2442

United States of America

v.

Henning Heldt and Duke Snider, Appellants

79-2447

United States of America

v.

Mary Sue Hubbard, Appellant

79-2448

United States of America

v.

Sharon Thomas, Appellant

79-2449

United States of America

v.

Gregory Willardson, Appellant

Judgment of Court of Appeals

79-2450

United States of America

v.

Richard Weigand, Appellant

79-2456

United States of America

v.

Cindy Raymond, Appellant

79-2459

United States of America

v.

Gerald Bennett Wolfe, Appellant

79-2462

United States of America

v.

Mitchell Hermann, Appellant

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before:

MacKinnon, Robb and Wald,

Circuit Judges

Judgment of Court of Appeals

JUDGMENT

These causes came on to be heard on the records on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court, that the judgments of the District Court appealed from herein are hereby affirmed, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ GEORGE A. FISHER
George A. Fisher
Clerk

Date: October 2, 1981

Opinion Per Curiam

Opinion concurring in part and concurring in the result filed by Circuit Judge Wald.

FILED OCT 2 1981
GEORGE A. FISHER
CLERK

Opposition

Office-Supreme Court, U.S.
FILED
MAR 19 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1227

In the Supreme Court of the United States

OCTOBER TERM, 1981

MARY SUE HUBBARD AND DUKE SNIDER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners, who were convicted on the basis of evidence seized pursuant to a warrant supported by probable cause, are entitled to have their convictions reversed because some of the agents executing the warrant were not fully instructed about the limits it imposed.

2. Whether the government breached a plea agreement that required it not to recommend a sentence for petitioner Hubbard, but permitted it to dispute statements of fact made by the defense, when it corrected a defense attorney's repeated incorrect statements that the government believed petitioner Hubbard should not be sentenced to jail.

3. Whether the trial judge should have recused himself.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1227

MARY SUE HUBBARD AND DUKE SNIDER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-107a) is not yet reported. The opinion of the district court dealing with the Fourth Amendment issue (Pet. App. 111a-233a) is reported at 493 F. Supp. 209. The district court's opinions and orders dealing with the other issues (Pet. App. 235a-269a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 2, 1981 (Pet. App. 379a-381a), and a petition for rehearing was denied on November 10, 1981 (Pet. App. 109a-110a). The petition for a

writ of certiorari was filed on December 31, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are members of the Church of Scientology. They and nine other Scientology members were indicted for conspiracies and substantive offenses involving a plan to obtain from the United States government by illegal means documents and other information relating to Scientology, and to obstruct a grand jury investigation into those illegal activities (Pet. App. 4a & nn. 1 & 2).[1]

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[1] Petitioners and defendants Henning Heldt, Gregory Willardson, Richard Weigand, Mitchell Hermann, and Cindy Raymond were charged with conspiracy to steal property of the United States (18 U.S.C. 641), to intercept oral communications (18 U.S.C. 2511(1)(a)), to forge United States government credentials (18 U.S.C. 499), and to burglarize offices of the Internal Revenue Service, the Department of Justice, and the Office of the United States Attorney for the District of Columbia (22 D.C. Code 1801(b)), all in violation of 18 U.S.C. 371 (Count 1). They were also charged with conspiracy to obstruct justice (18 U.S.C. 1503), to obstruct a criminal investigation (18 U.S.C. 1510), to harbor and conceal a fugitive (18 U.S.C. 1071), and to make false declarations (18 U.S.C. 1623), all in violation of 18 U.S.C. 371; and with one count of interception of oral communications, ten counts of burglary, ten counts of theft of United States property, and one count of obstruction of justice. Defendant Gerald Bennett Wolfe was charged with conspiracy to obstruct justice, obstruction of justice, five counts of burglary and five counts of theft. He was also charged with four counts of false declarations and was named by the grand jury as an unindicted co-conspirator in Count 1. Defendant Sharon Thomas was charged in the Count 1 conspiracy, two counts of burglary, and two counts of theft.

Two other defendants, Jane Kember and Morris Budlong, were in England when this case was tried. They were subse-

Petitioners moved to suppress evidence seized in searches of Scientology offices in California. After an extensive hearing, the district court denied their motion (Pet. App. 111a-233a). The district court then granted a motion by petitioners and their co-defendants, over the government's opposition, to enforce a Disposition Agreement they had made with the government (*id.* at 5a, 101a-103a). Under that agreement, petitioners were to be found guilty by the court on one count of conspiracy to obstruct justice on the basis of a stipulated record. The agreement also provided that the defendants would not challenge their convictions on the ground of insufficient evidence, and that the other charges in the indictment would be dismissed if the convictions were affirmed on appeal. Petitioner Hubbard was sentenced to a five-year term of imprisonment and a fine of $10,000. Petitioner Snider was sentenced to a four-year term of imprisonment and a fine of $10,000 (*id.* at 5a n.5).[2]

1. Late in the night of June 11, 1976, two Scientology members—Michael Meisner and Gerald Wolfe—were discovered in the United States Courthouse in Washington, D.C. Each produced Internal Reve-

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quently extradited on burglary charges and found guilty after a jury trial on nine counts of burglary. Their convictions have been affirmed on appeal. *United States* v. *Kember*, No. 80-2563 (D.C. Cir. Mar. 5, 1982). Pet. App. 4a nn.1 & 2.

[2] Defendants Raymond and Wolfe were each sentenced to five years' imprisonment and fined $10,000. Defendants Heldt, Willardson, Hermann, and Weigand were each sentenced to four years' imprisonment and fined $10,000. Defendant Thomas was sentenced to a one-year term of imprisonment; six months of that sentence were suspended and she was placed on probation for five years. She was also fined $1,000 (Pet. App. 5a n.5).

nue Service credentials and was allowed to leave. FBI agents later discovered that the credentials were false; Wolfe was apprehended in June 1976, but Meisner remained a fugitive until June 1977, when he surrendered and agreed to cooperate with the government (Pet. App. 10a-11a, 292a-293a).

Meisner explained, in detail, that Scientology members both infiltrated and broke into offices of the Internal Revenue Service, the Drug Enforcement Administration, and the Tax Division of the Department of Justice, where they copied documents of interest to Scientology and delivered them to Meisner for transmission to Scientology's offices in Washington, D.C., and Los Angeles (Pet. App. 16a-17a, 295a, 300a-312a).[3] Meisner and Wolfe had entered the United States Courthouse after hours on several occasions, using their false IRS credentials, in order to gain access (by means of keys they had stolen) to the office of an Assistant United States Attorney in the courthouse; there they found and copied documents (*id.* at 18a-19a, 313a-328a).

After they encountered the FBI in the courthouse, Meisner and Wolfe were directed by their superiors in the Scientology office in Los Angeles to prepare fabricated stories to tell the authorities (Pet. App. 20a-21a, 338a-340a). Wolfe accordingly testified before a grand jury that he had no connection with

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[3] Meisner also explained that Scientology had special filing categories for materials illegally obtained from the government ("non-FOI," to distinguish them from materials obtained under the Freedom of Information Act and to ensure that they would not be inadvertently disclosed to the public), for materials linked to illegal activity generally ("Red Box"), and for programs directed against the government ("Snow White"). See Pet. App. 6a-9a & n.7, 40a-41a n.27. These filing categories were subsequently used in the search warrants.

Scientology and had been in the courthouse solely to use the law library for personal research (*id.* at 12a, 15a, 340a-341a). Meisner fled to Los Angeles, where he disguised his appearance. In April 1977, Scientology members became fearful that Meisner would surrender himself, and they placed him under guard and handcuffed and gagged him (*id.* at 20a-21a, 337a, 341a-343a, 352a).

The Church of Scientology's "Guardian's Office" was responsible for these activities (Pet. App. 16a-17a, 20a-21a, 136a-140a). Petitioner Hubbard was one of the two ranking officers of the Guardians in the United States; petitioner Snider was a deputy to the other ranking officer (*id.* at 16a, 34a, 334a).

2. An FBI agent executed an affidavit in support of search warrant applications recounting Meisner's information and the government's independent confirmation of several aspects of Meisner's account. On the basis of that affidavit, the government obtained warrants to search two Scientology offices—the Fifield Manor and the Cedars-Sinai Complex—in Hollywood, California (Pet. App. 32a-33a & n.15). Petitioners do not deny that there was probable cause to support the warrants. The warrants (see *id.* at 271a-378a) identified 161 specific documents and categories of documents that were evidence that Scientology officials had conspired to steal and did steal government documents, and that they had conspired to and did obstruct justice.[4] Item 162 of the warrant, which

[4] Most of the 161 items were documents stolen from the government (Items 1-148). The other items named in the warrant included memoranda of Scientology officials explaining and transmitting those documents (Items 158-161), documents relating to the creation of a cover-up story to obstruct the grand jury's investigation into the burglary of the United States Attorney's office (Items 149-151), and documents estab-

was patterned after a clause in a warrant approved by this Court in *Andresen* v. *Maryland*, 427 U.S. 463, 481-482 (1976), authorized the seizure of the following (Pet. App. 288a):

> Any and all fruits, instrumentalities, and evidence (at this time unknown) of the crimes of conspiracy, obstruction of justice and theft of government property in violation of 18 U.S. Code §§ 371, 1503 and 641 which facts recited in the accompanying affidavit make out.

The affidavit based on Meisner's account was appended.

The day before the warrant was executed, various supervisory and legal personnel from the FBI's Los Angeles office and others from the United States Attorney's office in Washington briefed the agents who had been selected to participate in the searches. Four rooms in Fifield Manor, including petitioner Snider's office, were searched, and approximately 430 documents were seized. The Cedars-Sinai search was far more extensive; over 30 rooms were searched by approximately 100 agents (Pet. App. 34a-35a).

3.a. The court of appeals rejected petitioners' claim that the searches violated the Fourth Amendment. The court noted that petitioners did not contend that any of the documents used against them were not within the warrant, or that the warrant was not supported by probable cause. Instead, petitioners' Fourth Amendment claim rested entirely on the assertion that all the documents should be suppressed because the searches were impermissibly "general"—either because Item 162 was too inclusive,

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lishing and discussing plans by the Guardian's Office of Scientology to infiltrate government agencies and steal government documents (Items 152-156).

or because the searches were improperly executed (Pet. App. 42a-43a). The court explained (*id.* at 46a n.33 (emphasis in original)):

> [I]f any of the documents used by the government as evidence-in-chief against defendants had been seized without scrupulous adherence to the warrant, we might be required to reverse. But defendants make no case for suppressing these particular documents on those grounds * * *. [R]ather the question is whether documents *lawfully seized under a valid warrant* should be suppressed because the search accompanying their seizure was too general.

The court of appeals rejected the argument that Item 162 was too general on the authority of *In re Search Warrant Dated July 4, 1977*, 572 F.2d 321 (D.C. Cir. 1977), cert. denied *sub nom. Founding Church of Scientology* v. *United States*, 435 U.S. 925 (1978).[5] The court then stated that "in some cases a flagrant disregard for the limitations in a warrant might transform an otherwise valid search into a general one, thereby requiring the entire fruits of the search to be suppressed" (Pet. App. 43a), but that the mere fact that the officers seized some items not

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[5] That decision arose from a simultaneous search carried out at Scientology's Washington, D.C., office, on the basis of a virtually identical warrant (containing a clause identical to Item 162) and affidavit. The court of appeals, after holding on the authority of *Andresen* v. *Maryland*, *supra*, that Item 162 was not excessively general, remanded the case to the district court to consider the legality of the execution of that warrant. In No. 81-1275, the Founding Church of Scientology is seeking review of the court of appeals' decision overturning the district court's holding that the execution of that search violated the Fourth Amendment. Evidence found in that search was not involved in this prosecution.

within the warrant did not justify the suppression of those articles that were lawfully seized (*id.* at 44a).

The court reviewed in some detail the facts surrounding the searches, focusing particularly on the use at Cedars-Sinai of 50 agents who had not been briefed, and who were assigned to the search only after it had begun and the supervising agents realized the magnitude of the task. The court concluded that "most of the agents conducting the search were provided with as much preparation and information as was reasonable under the circumstances" (Pet. App. 48a). In particular, the court rejected the suggestion that "the arrival of a supplementary contingent of inadequately prepared agents * * * require[d] the exclusion of all seized documents" (*id.* at 49a). The court explained (*id.* at 49a-50a; footnotes omitted):

> Those agents who received inadequate information initially, and who were brought in only after the supervising agents on the scene determined that additional manpower was required, always represented less than half the total of those searching at Cedars-Sinai. The agents operated in teams and there is no evidence that the first group of agents, or the late arriving agents, were not adequately supervised. They were instructed that if they had questions regarding particular documents, they should seek out their search team leaders who would determine whether the documents fell within the scope of the warrants; such consultations occurred frequently throughout the operation. They were also informed that copies of the warrant and affidavit would be available for their use within the search area. Even more important, the late-arriving agents worked alongside

> and in conjunction with others—both supervisors and searchers—who had been satisfactorily briefed, who had reviewed the warrant and affidavit and had them in their possession, and who assisted the newcomers in their choice of documents to be seized. As a final measure, the leaders of the search reviewed many of the documents initially seized by the new agents in order to compare them to the warrant's particulars, before listing them in the inventory of items to be seized.

The court of appeals also rejected petitioners' suggestion that the agents searching at Fifield Manor exceeded the geographical limits specified in the warrant (Pet. App. 50a-56a). The warrant authorized a search of "the suite of offices of Mr. Henning Heldt" (*id.* at 51a), and the agents searched four rooms, one of which, petitioners claimed, was the office of Mrs. Janet Lawrence. The court of appeals, after examining the geography of the building and the connections between the two offices (*id.* at 51a-55a), concluded that "entry into Lawrence's office was not outside the area limitation of the Fifield Manor warrant" (*id.* at 55a). In addition, the court noted that "[t]he defense * * * has conceded that none of the documents seized from Mrs. Lawrence's office were used as evidence-in-chief by the prosecution, and has failed to make even a colorable argument that they were used in any other fashion by the government" (*ibid.* (footnote omitted)). Consequently, since the decision to enter the Lawrence office was made on a "good faith, rational basis" after deliberation and consultation with an Assistant United States Attorney (*ibid.*), the court rejected petitioners' argument that the search of the Lawrence office required the suppression of all the other evidence.

The court then noted petitioners' claim that some of the documents seized were not specifically described in the warrants and could not properly have been seized under the "plain view" exception to the warrant requirement. But again, the court said, petitioners had not shown that any such documents were introduced into evidence against them (Pet. App. 62a-63a). Therefore, the court reiterated, "our concern * * * relates solely to determining whether a violation of such egregious magnitude occurred that *all* fruits of the search must be suppressed" (*id.* at 62a (emphasis in original)). After reviewing the principles governing the application of the "plain view" exception to documents (*id.* at 56a), the court declined to take such a step (*id.* at 63a).

b. The court then turned to, and rejected, petitioners' contention that the trial judge should have disqualified himself. The principal basis of this contention was that extraordinary security measures had been instituted, and that the judge had suggested—falsely, according to petitioners—that the measures were unconnected to the case. The court of appeals, assuming the truth of petitioners' factual allegations, rejected the suggestion that either the adoption of security measures or the judge's refusal to acknowledge the reason for them required him to disqualify himself. Noting the nature of the crimes which petitioners and their co-defendants admitted they had committed, the court of appeals said: "We disagree with defendants that the record contains nothing that might cause the judge to fear for his safety, for the safety of government witnesses, or for the orderliness of the proceedings" (Pet. App. 70a). The court of appeals also discussed the trial judge's alleged deceptiveness (*id.* at 72a-73a):

> If the judge had reasonable grounds to fear that [petitioners or their co-defendants] or some isolated [Scientology] member * * * might be carried away by the passion of the moment and take some rash action, he had no obligation to tell them or their counsel that the security was imposed for that reason. * * * Indeed, the effectiveness of security measures may be diminished if their existence or purpose is disclosed.
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> * * * * *
>
> From all the circumstances it appears that a reasonable explanation of the judge's statement is that it was an inartful attempt to tell appellants that the security measures were a matter for the court and the Marshal to determine. The court also may have been motivated to protect the defendants from the damaging publicity that might have resulted from a statement by the court as to their numerous illegal acts as disclosed by the court file.

For these reasons, the court concluded, petitioners had shown neither actual prejudice nor an appearance of partiality sufficient to require the judge to disqualify himself.

c. Finally, after rejecting a number of claims that are not renewed in this Court, the court of appeals ruled that the government did not violate the Disposition Agreement by commenting on petitioner Hubbard's sentence. That agreement provided (Pet. App. 83a, 102a):

> As to the defendant Hubbard, the government agrees to advise the Court as follows: "the government takes no position and is making no request on the matter of sentence with respect to the defendant Hubbard." It is understood that Mrs. Hubbard through her counsel will make no

> statement in allocution concerning the facts of the case. It is further agreed that as to any defendant, including Mrs. Hubbard, the government may dispute any statements of fact on any matter with which it has disagreement * * *.

The government asserted that the defendants never accepted this agreement, but the district court, after holding a hearing, ruled against the government and ordered the agreement enforced. At the hearing, however, petitioner Hubbard's counsel testified repeatedly that "the government stated that it did not want Mrs. Hubbard to go to jail" (Pet. App. 85a; see *id.* at 84a). In their proposed findings of fact, petitioners again attributed this position to the government (*id.* at 87a). In response, the government informed the court that the statements of petitioner's counsel were incorrect, that the United States Attorney (who, at the defendants' instance, was barred from testifying at the hearing) personally believed that petitioner Hubbard should receive a jail sentence, and that the government had had different reasons for agreeing not to comment on Hubbard's sentence (*id.* at 87a).

These statements were the basis for petitioner's claim that the government violated the agreement. The court of appeals ruled, however, that the government's statements were a "direct response" to the contrary representations of defense counsel; "[b]elieving as it did that [defense counsel's] statement was a misrepresentation of its position the government was under a duty to dispute it" (Pet. App. 88a). Moreover, the court ruled, the government was entitled to invoke the provision of the agreement which allowed it to dispute statements of fact made on petitioners' behalf (*ibid.*).

ARGUMENT

1. As the court of appeals emphasized, petitioners do not—and cannot (Pet. App. 42a n.29)—deny that the evidence used against them was seized pursuant to the warrants, and that the warrants were supported by probable cause. Nevertheless, petitioners contend that because Item 162 was too general, and because of the way in which the search was executed, their convictions should be overturned.

In *In re Search Warrant Dated July 4, 1977*, *supra*, the Church of Scientology asked this Court to rule that a clause identical to Item 162, in a warrant essentially identical to those at issue here and based on an essentially identical affidavit, was too broad. See page 7 note 5, *supra*. The Court declined that invitation (*Founding Church of Scientology* v. *United States*, 435 U.S. 925 (1978)), and the issue is no more worthy of review now. *Andresen* v. *Maryland*, *supra*, 427 U.S. at 478-484, upheld a search conducted under a warrant with a similar clause, on which Item 162 was modeled. Indeed, unlike the clause at issue in *Andresen*, Item 162 was explicitly limited by reference to the affidavit, and was not susceptible of any reading that discounted that limitation. The affidavit carefully described in specific detail a course of illegal conduct. While this course of conduct was protracted and complex, thus potentially placing many documents within the warrant, it is difficult to see how the government and the magistrate—who could not have known the addressee, date, title, or similar identifying characteristics of every particular document—could have been more specific.

The courts of appeals have consistently held that items seized pursuant to a valid warrant are not to

be excluded from evidence merely because the officers conducting the search also seized items not specified in the warrant. See, *e.g.*, *United States* v. *Dunloy*, 584 F.2d 6, 11 n.4 (2d Cir. 1978); *United States* v. *Forsythe*, 560 F.2d 1127, 1134 (3d Cir. 1977); *United States* v. *Daniels*, 549 F.2d 665, 668 (9th Cir. 1977); *United States* v. *Artieri*, 491 F.2d 440, 445-446 (2d Cir.), cert. denied, 419 U.S. 878 (1974); *United States* v. *Mendoza*, 473 F.2d 692, 696-697 (5th Cir. 1972); *United States* v. *Cox*, 462 F.2d 1293, 1306 (8th Cir. 1972); *United States* v. *Holmes*, 452 F.2d 249, 259 (7th Cir. 1971), cert. denied, 405 U.S. 1016, 407 U.S. 909 (1972); *Brooks* v. *United States*, 416 F.2d 1044, 1050 (5th Cir. 1969), cert. denied, 400 U.S. 840 (1970); *United States* v. *Giresi*, 488 F. Supp. 445 (D. N.J. 1980), aff'd, 642 F.2d 444 (3d Cir. 1981), cert. denied, No. 80-1631 (June 15, 1981). See also *Andresen* v. *Maryland*, *supra*, 427 U.S. at 482 n.11;[6] *United States* v. *Scott*, 516 F.2d 751, 760 n.19 (D.C. Cir. 1975), cert. denied, 425 U.S. 917 (1976). It would serve no useful purpose—and would seriously impair law enforcement while distorting the actions and judgments of law enforcement agents—to penalize an error in the execution of a warrant by suppressing not only the fruits of that erroneous act but all the evidence seized pursuant to the warrant. Petitioners provide no argument or authority to support their contrary position.

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[6] Indeed, here the government took the course specifically approved in *Andresen* by voluntarily returning to Scientology members 40% of the documents seized in the two searches (Pet. App. 35a n.22).

We are willing to agree *arguendo*, as the court of appeals did, that where officers executing a warrant flagrantly ignore its limitations, the exclusionary rule might require suppressing even items seized pursuant to the warrant.[7] But the court of appeals, after examining the facts of this case in detail, unanimously concluded[8] that while the searches may have exceeded the scope of the warrants and of the "plain view" exception, there was no justification for suppressing all the evidence seized. In challenging this conclusion, petitioners emphasize principally the preparation of the searching officers (*e.g.*, Pet. 4-8). But the court of appeals addressed this issue and concluded that while some of the officers conducting the search may not have been fully prepared, they were supervised in a way that made up for that deficiency. In view of the extraordinary logistical problems involved in conducting searches of the sort at issue here, law enforcement authorities must be

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[7] Contrary to petitioners (see Pet. 23), the court of appeals did not adopt the view, accepted by such cases as *United States* v. *Williams*, 622 F.2d 830, 840 (5th Cir. 1980), cert. denied, 449 U.S. 1127 (1981), that evidence obtained in violation of the Fourth Amendment may *itself* be admitted if the searching officers acted in good faith. Rather, the court relied on the principle that a good faith transgression justifies exclusion of the fruits of that transgression but not exclusion of other evidence discovered pursuant to a valid warrant.

[8] While Judge Wald disagreed with the court's conclusion that the warrant authorized the search of the Lawrence office, and qualified her concurrence with certain other aspects of the court's opinion, she made it plain that in her view "the circumstances under which [the search] was conducted do not represent such flagrant disregard for the warrant as to convert the search into a general one requiring total suppression of all documents seized" (Pet. App. 105a).

allowed some flexibility in structuring their operations, and there is no reason for this Court to re-evaluate the court of appeals' determination that the authorities—given the exigencies of the search—used an acceptable combination of preparation and supervision in this case.

Moreover, it appears that these petitioners cannot claim that the government actions they challenge violated their Fourth Amendment rights. Those actions occurred principally at Cedars-Sinai, which, like Fifield Manor, was a Scientology office building. Petitioners do not now contend—and did not contend in the court of appeals[9]—that either petitioner Snider or petitioner Hubbard had an office at Cedars-Sinai. Indeed, petitioner Hubbard appears to make no claim that she was ever inside either Cedars-Sinai or Fifield Manor. It is therefore unlikely that either petitioner has "standing" to object to the search of Cedars-Sinai, for that search did not "infring[e] an interest of [either petitioner] which the Fourth Amendment was designed to protect" (*Rakas* v. *Illinois*, 439 U.S. 128, 140 (1978)).[10] For these reasons

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[9] See Appellants' Brief I at 120-150; Brief for Appellant Mary Sue Hubbard 49-65.

[10] In the court of appeals, petitioners urged essentially that because they were associates of the Scientology members who had offices at Cedars-Sinai, or corresponded with those whose officers were searched, they had a legitimate expectation of privacy in those offices. But this amounts to an argument that because documents that concerned petitioners were in the areas searched, petitioners had an expectation of privacy in those areas—an argument that would essentially allow any party to challenge almost any search that uncovered evidence that incriminated him. There is no basis for this expansive view of petitioners' expectations of privacy. See, *e.g.*, *United States* v. *Torch*, 609 F.2d 1088, 1091 (4th Cir. 1979), cert. denied, 446 U.S. 957 (1980); *United States* v. *Bush*, 582 F.2d

as well, petitioners' assertions that the Cedars-Sinai search was improperly executed do not entitle them to relief.

So far as the Fifield Manor search is concerned, petitioners appear to challenge only the search of the Lawrence office (see Pet. 8). Petitioner Snider had an office in Fifield Manor, but that office was adjacent to the office of Henning Heldt, to whom Snider was an assistant (see Pet. App. 52a), and petitioners do not appear to deny that it was properly comprehended in the warrant's authorization to search "the suite of offices of Mr. Henning Heldt" (*id.* at 51a). Petitioner Hubbard asserts that she had a protected interest in the Lawrence office because Lawrence was her secretary,[11] but the district court found otherwise (*id.* at 127a): "The evidence before the Court shows that Hubbard did not even have a key to this office * * * and there is no evidence that she ever set foot in it. Accordingly, the Court finds that * * * Hubbard has no legitimate expectation of privacy in documents located in the office * * *."[12]

1016, 1018-1019 (5th Cir. 1978); *United States* v. *Cella*, 568 F.2d 1266, 1282-1283 (9th Cir. 1977); *United States* v. *Britt*, 508 F.2d 1052 (5th Cir.), cert. denied, 423 U.S. 825 (1975). See also *Rawlings* v. *Kentucky*, 448 U.S. 98, 104-106 (1980).

As the district court recognized (Pet. App. 126a-132a), this case is wholly different from *Mancusi* v. *DeForte*, 392 U.S. 364, 367-370 (1968), where this Court held that a defendant could challenge the search of an office he shared with others; here, petitioners seek to challenge searches of offices that were in no sense their own.

[11] Indeed, at Pet. 23, petitioners refer to the Lawrence office as "Mrs. Hubbard's office."

[12] The court of appeals did not address questions of standing, apparently because it believed that other defendants who

In any event, there is no basis for suggesting that the search of Fifield Manor—far less extensive than the search of Cedars-Sinai—was so excessive as to justify the suppression even of materials that were within the warrant. The court of appeals' finding that the warrant authorized a search of the Lawrence office plainly establishes at least that the agents' carefully considered decision to search that office did not display the sort of flagrant disregard for the warrant that might justify a total suppression of the evidence. Since none of the items found in the Lawrence office were used against petitioners (Pet. App. 55a), no aspect of the search of Fifield Manor supports either petitioner's claim for relief.

2. Petitioner Hubbard's contention that the government violated its plea agreement with her (Pet. 25-27) is without foundation. As the court of appeals recognized, neither this nor any other plea agreement can conceivably be read to authorize a defendant to make false statements about the government's views on the appropriate sentence. Contrary to petitioner (Pet. 25-26), the court's ruling will not discourage defendants from plea bargaining, so long as they do not hope to be able to make unrefuted false statements about the government's position. Moreover, here the agreement specifically empowered the government to dispute the defendants' statements of fact.[13]

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are not petitioners here might have had a protected interest in some portion of the Cedars-Sinai premises; the court accordingly thought it appropriate to determine the legality of both searches. See Pet. App. 41a-42a n.28.

[13] Petitioner Hubbard quotes (Pet. 15) a passage from the government's sentencing memorandum which, she says, violated the agreement. But that passage reveals no more than

3. Petitioners' contention that the trial judge should have disqualified himself (Pet. 27-28) was fully answered by the opinion of the court of appeals, which shows that there was no basis for inferring from the trial judge's actions that he was (or reasonably appeared to be) biased against petitioners. Petitioners now refer to an affidavit that the court of appeals declined to address specifically. As the court noted, however, that affidavit added nothing to the evidence already considered by the court (see Pet. App. 70a n.73). The affidavit alleges that the trial judge made harsh remarks about the defendants; but those remarks are explicable as the result of the evidence the judge had heard in court, and there is no showing that they "stem[med] from an extra-judicial source"—a prerequisite to using the remarks as a basis for disqualification, as petitioners recognize (Pet. App. 69a). See, *e.g.*, *United States* v. *Grinnell Corp.*, 384 U.S. 563, 583 (1966). The court of appeals also fully dealt with the contention that the judge's concerns for his own security—the other matter mentioned in the affidavit—reflected bias against petitioners (Pet. App. 70a-72a).

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what the court already must have known from reading the agreement—that because of the agreement, the government would withhold comment on petitioner Hubbard's sentence. There is no conflict with the cases cited by petitioner (Pet. 26-27), in each of which the government agreed to make a specific sentencing recommendation but was held to have indicated to the court that it in fact favored a different sentence. Petitioner fleetingly suggests (Pet. 15, 26) that the government violated the agreement by providing certain information to the probation officer for a presentence report; but it is clear from the terms of the agreement that the government was not required to refrain from doing so.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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